86-607

No. ___

Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIAMOND SHAMROCK CORPORATION

Petitioner,

v.

JOHN HAMILTON, MARTHA FRANCIS, MORRIS A. RICHARDSON, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, and DAVID B. TRUMBO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

H. B. WATSON, JR.
Counsel of Record
RICHARD K. BOOKS
SHARON TAYLOR THOMAS
WATSON & MCKENZIE
1900 Liberty Tower
Oklahoma City, OK 73102
(405)232-2501

Attorneys for Diamond Shamrock Corporation

October 14, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. (a) Does Fed. R. Civ. P. 49(b), and cases decided thereunder which hold that a party waives the inconsistency of a jury's verdict by not raising it prior to discharge of the jury, apply to a verdict which is not accompanied by special interrogatories?

(b) If so, do they permit a federal court of appeals to reverse a trial court's determination that a new trial is proper?

2. May a federal court of appeals order that a verdict, which is supported by no evidence on essential elements, be reinstated without addressing the errors raised by a party which show that the party is entitled to judgment notwithstanding the verdict?

3. Whether the Court of Appeals erred in deciding issues in one appeal which were not raised in that appeal, but which were properly raised and fully briefed only in a separate appeal?

LIST OF PARTIES AND RULE 28.1 LIST

All parties to this case are named in the caption.

Diamond Shamrock Corporation has no parent company. All of Diamond Shamrock Corporation's subsidiaries are wholly owned. The following are subsidiaries which are not wholly owned by Diamond Shamrock Corporation's wholly-owned subsidiaries: Diamond Shamrock (Africa) Pty. Ltd., Hamada Agricultural Company Limited, Industrials Chemicals (Nigeria), Dichem Limited, Sirotherm, Inc., Metal Coatings International Inc., Metal Coatings International Comercial Ltda., Dacral S.A., Nippon Dacro Shamrock Co., Ltd., Nippon C & Z Company, Ltd., Muenzing Chemie GmbH, A. L. A. Chemicals Limited, Lankro Chemicals Limited, Tongue River Holdings, Inc. Diamond Shamrock has no other affiliates or subsidiaries (except wholly owned subsidiaries).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
Proceedings Below—Introduction	9
Proceedings Below—Appeal From Certified Interlocutory Order	10
Separate Appeal From Final Judgement	11
Decision Below	12
REASONS FOR GRANTING THE WRIT	
I. a. The Tenth Circuit's Decision that a Verdict Not Accompanied With Special Interrogatories Falls Within Fed. R. Civ. P. 49(b) and that a Party Waives Inconsistency in Such a Verdict is in Direct Conflict With Decisions of Other Circuits and Raises a Recurring and Important Question of Procedure Concerning Fed. R. Civ.P. 49.	14
b. The Tenth Circuit's Reversal of the Trial Court's Order Granting a New Trial is in Direct Conflict With a Decision of the Seventh Circuit and is in Conflict With Established Case Law Holding that the Trial Court Has Broad Discretion in Granting a New Trial.	19

II. The Tenth Circuit, by Deciding Issues Properly Raised and Fully Briefed Only in a Separate Appeal and by Failing to Decide Issues Raised on Appeal Pertaining to Diamond Shamrock's Entitlement to Judgment Notwithstanding the Verdict, has so far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision 23

CONCLUSION 27

TABLE OF AUTHORITIES

CASES: Page

Adkins v. Adams, 152 F.2d 489 (7th Cir. 1945) 25

Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941) 20

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed.2d 193 (1980) 24

Alverez v. J. Ray McDermott & Co., 674 F.2d 1037 (5th Cir. 1982) 18

Bell v. Ralston Purina Co., 257 F.2d 31 (10th Cir. 1958) 26

Brimmer v. Union Oil Co. of California, 81 F.2d 437, 440 (10th Cir. 1936), *cert. den.*, 298 U.S. 668, 56 S. Ct. 833, 80 L. Ed. 1391 (1936) 25

Brunner v. Maritime Overseas Corp., 779 F.2d 296 (5th Cir. 1986), *cert. den.*, 106 S. Ct. 1971, 90 L. Ed.3d 655, 54 U.S.L.W. 3761 (1986) 15

Burger King Corp. v. Mason, 710 F.2d 1480 (11th Cir. 1983), *reh. den.*, 718 F.2d 115 (11th Cir. 1983), *cert. den.*, 465 U.S. 1102, 104 S. Ct. 1599, 80 L. Ed.2d 130 (1984) 16, 21

Burkett v. Moran, 410 P.2d 876 (Okl. 1965) 18

Cheney v. Moler, 285 F.2d 116 (10th Cir. 1960) 16, 17

City of Los Angeles v. Heller, 475 U.S. ___, 106 S. Ct. 1571, 89 L. Ed.2d 806, 54 U.S.L.W. 3693 (1986) 22

Community National Life Insurance Co. v. Parker Square Savings & Loan Association, 406 F.2d 603 (10th Cir. 1969) 21

Cundiff v. Washburn, 393 F.2d 505 (7th Cir. 1968) 19

Farmers' Mutual Oil Leasing Co. v. Bonneau, 110 Okl. 168, 237 P. 83, 84 (1924) 25

Fernandez v. Chardon, 681 F.2d 42, 58 (1st Cir. 1982), *aff'd., Chardon v. Fumero Soto*, 462 U.S. 650, 103 S. Ct. 2611, 77 L. Ed.2d 74 (1983) 17

Table of Authorities Continued

	Page
Fugitt v. Jones, 549 F.2d 1001 (5th Cir. 1977) ...	15, 21
Gay v. United States, 118 F.2d 160 (7th Cir. 1941)	21
Global Van lines, Inc. v. Nebeker, 541 F.2d 865, 865 (10th Cir. 1976)	18
Griffin v. Matherne, 471 F.2d 911 (5th Cir. 1973), *reh. den.*, 474 F.2d 1347 (5th Cir. 1973	17, 21
Guidry v. Kem Mfg. Co., 598 F.2d 402 (5th Cir. 1979), *reh. den.*, 604 F.2d 320 (5th Cir. 1979), *cert. den.*, 445 U.S. 929, 100 S. Ct. 1318, 63 L. Ed.2d 1318 (1980)	18
Holmes v. Wack, 464 F.2d 86 (10th Cir. 1972) ..	20
Hopkins v. Coen, 431 F.2d 1055, 1059 (6th Cir. 1970)	16, 18
Iacurci v. Lummus Co., 387 U.S. 86, 87 S. Ct. 1843, 18 L. Ed.2d 581 (1967)	20
In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 304 n.55 (3rd Cir. 1983), *later proc.*, 723 F.2d 319 (3rd Cir. 1983), *rev'd. on other grds., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ___ U.S. ___, 106 S. Ct. 1348, 89 L. Ed.2d 538, 54 U.S.L.W. 4319 (1986)	25
Indian Territory Illuminating Oil Co. v. Rosamond, 190 Okl. 46, 120 P.2d 349 (1941)	25
International Longshoremen's & Warehousemen's Union v. Hawaiian Pineapple Co., 226 F.2d 875, 881 (9th Cir. 1955), *cert. den.*, 351 U.S. 963, 76 S. Ct. 1026, 100 L. Ed. 1483 (1956)	20
Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913)	25
Ladnier v. Murray, 769 F.2d 195 (4th Cir. 1985)	15

Table of Authorities Continued

	Page
Lansburgh & Bro., Inc. v. Clark, 75 App. D.C. 339, 127 F.2d 331, 333 (1942)	20
Malley-Duff & Associates, Inc. v. Crown Life Ins. Co., 734 F.2d 133 (3rd Cir. 1984), *cert. den.*, 105 S. Ct. 564, 83 L. Ed.2d 505, 53 U.S.L.W. 3417 (1984)	15-17
McCormick v. City of Wildwood, 439 F. Supp. 769 (D.C. N.J. 1977)	16
Mercer v. Long Mfg. N.C., Inc., 665 F.2d 61, (5th Cir. 1982), *reh. den.*, 671 F.2d 946 (5th Cir. 1982)	14, 16, 22
National Surety Co. v. Board of Education of City of Hugo, 36 Okl. 569, 129 P. 25, 27 (1912)	26
Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 729 F.2d 1530 (5th Cir. 1984)	20
Plains Petroleum Corp. v. Fine, 174 Okl. 570, 51 P.2d 284 (1935)	26
Pugh v. Bluff City Excursion Co., 177 F. 399 (6th Cir. 1910).	17
Schneider v. Lockheed Aircraft Corp., 212 App. D.C. 87, 658 F.2d 835 (1981).	20
Segars v. Atlantic Coast Line Railroad Co., 286 F.2d 767 (4th Cir. 1961)	21
Spaeth v. Union Oil Co. of California, 710 F.2d 1455 (10th Cir. 1983), *later app.*, 762 F.2d 865 (10th Cir. 1985), *cert. den.*, ___ U.S. ___, 106 S. Ct. 1946, 90 L. Ed.2d 356, 54 U.S.L.W. 3729 (1986)	26
State ex rel. Commissioners of the Land Office v. Couch, 298 P.2d 452 (Okl. 1956)	25
Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624, L. Ed.2d 654 (1960)	25
Turner v. "The Cabins," Tanker, Inc., 327 F. Supp. 515 (D.C. Del. 1971)	16

Table of Authorities Continued

	Page
United States v. Ft. Sill Apache Tribe of the State of Oklahoma, 205 Ct. Cl. 805, 507 F.2d 861 (1974)	23, 24
Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980) *cert. den.*, 449 U.S. 1980, 101 S. Ct. 862, 66 L. Ed.2d 804 (1981)	16
Witt v. Westheimer, 182 Okl. 645, 79 P.2d 250 (1938)	25
Wood v. Holiday Inns, Inc., 508 F.2d 167 (5th Cir. 1975)	16
STATUTES AND RULES:	
28 U.S.C. §1254(1)	2
28 U.S.C. §1292(b)	10, 12, 23
28 U.S.C. §1332	3
Fed. R. Civ. P. 49	2-3, 12-19
Fed. R. Civ. P. 50(b)	21
Fed. R. Civ. P. 54(b)	10-12, 23-24
Fed. R. Civ. P. 59	18, 20
MISCELLANEOUS:	
6A Moore's *Federal Practice*, Para. 59.08[1] at p. 59-81 (1985).	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ___

DIAMOND SHAMROCK CORPORATION,

Petitioner,

v.

JOHN HAMILTON, MARTHA FRANCIS, MORRIS A. RICHARDSON, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, and DAVID B. TRUMBO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Diamond Shamrock Corporation ("Diamond Shamrock") petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 791 F.2d 416, and is reprinted in the Appendix hereto, App. A. The orders and opinions of the United States District Court for the Western District of Oklahoma (Eubanks, D.J.) are not reported. They are reprinted in the Appendix hereto, App. B, C, D and E.

JURISDICTION

The judgment of the Court of Appeals was entered May 21, 1986. Petitioner timely requested rehearing and suggested rehearing *en banc* to the Court of Appeals, which denied both in an order dated July 16, 1986, (App. F), as corrected by an order dated July 21, 1986, (App. G), making the petition for certiorari due on October 14, 1986. This Court has jurisdiction to issue the requested writ under 28 U.S.C. §1254(1) (1983).

STATUTE INVOLVED

Fed. R. Civ. P. 49 provides:

> "RULE 49. SPECIAL VERDICTS AND INTERROGATORIES.
>
> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make

a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) *General Verdict Accompanied by Answer to Interrogatories.* The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for futher consideration of its answers and verdict or shall order a new trial.

STATEMENT OF THE CASE

In 1981, Petitioner instituted this damage action against Respondents Zinke & Trumbo, Ltd., Robert M. Zinke and David B. Trumbo ("Zinke & Trumbo"). The jurisdiction of the district court was invoked under 28 U.S.C. §1332 because of diversity of citizenship. Diamond Shamrock al-

leged that Zinke & Trumbo breached a joint operating agreement entered into by the parties by failing to pay their proportionate share of the drilling and completion expenses for the John Hamilton No. 1-33 gas well located in Ellis County, Oklahoma. Diamond Shamrock sought recovery of Zinke & Trumbo's share of the unpaid well costs.

Zinke & Trumbo answered, denying liability for well costs because of the alleged gross negligence on the part of Diamond Shamrock in completing the well. Zinke & Trumbo also asserted a counterclaim for damages which occurred as a result of the alleged gross negligence.[1]

Respondents John Hamilton, Martha Francis and Morris Richardson joined in Zinke & Trumbo's counterclaim, seeking damages for Diamond Shamrock's alleged negligence in the completion of the well. All Respondents have been represented by the same counsel. Hamilton and Francis are lessors under oil and gas leases owned by Diamond Shamrock. Richardson is a lessor under an oil and gas lease owned by Zinke & Trumbo.

Hamilton and Francis also counterclaimed for damages for the alleged breach of the implied covenants of their oil and gas leases to protect against drainage and to market production.

Two jury trials were held—the first in 1983 and the second in 1985. The evidence at the first trial revealed that the John Hamilton No. 1-33 Well was drilled in a 640-acre drilling and spacing unit for production from the Morrow common source of supply. The well was commenced in January, 1982, and completed in four zones of the Lower Morrow formation in September, 1982. R., Vol. VI, pp. 57, 167-69, 176-77; Vol. VII, pp. 387-88; Vol. VIII, pp. 541-43; Vol. IX, p. 773. It was completed as a shut-

[1] Zinke & Trumbo also asserted other counterclaims which are not material to the consideration of the questions presented herein.

in well awaiting a pipeline connection. R., Vol. IX, pp. 766, 771-72, 924.

During the course of the trial, Article V.A. of the operating agreement, "Designation and Responsibilities of Operator", was read to the jury. R., Vol. VI, pp. 117-18. That article designated Diamond Shamrock as operator of the unit and provided: "It shall conduct all such operations in a good and workmanlike manner, but it shall have no liability as Operator to the other parties for losses sustained or liabilities incurred, except such as may result from gross negligence or willful misconduct."

Diamond Shamrock presented evidence that the costs incurred in completing the John Hamilton No. 1-33 Well were reasonable and necessary and that they were incurred in a good and workmanlike manner. R., Vol. VI, pp. 64, 65, 176; Vol. IX, pp. 816, 921. Zinke & Trumbo contended that they were not liable for such costs because the costs were allegedly incurred in a negligent or grossly negligent manner. R., Vol. VII, pp. 317-18, 322, 407; Vol. VIII, pp. 552-53, 651-52.

Hamilton, Francis and Richardson did not testify about their counterclaim for negligence. Nor did Hamilton and Francis testify about their counterclaims for breach of the implied covenants to market and to protect against drainage. It is undisputed that Hamilton and Francis did not make any demands upon Diamond Shamrock to perform any implied covenant of their oil and gas leases. No evidence was admitted as to the terms and provisions of the oil and gas leases which Hamilton and Francis alleged that Diamond Shamrock had breached. Diamond Shamrock stipulated in the Pretrial Conference Memorandum that the oil and gas leases existed, but did not stipulate as to their terms and provisions.

The trial court overruled Diamond Shamrock's Motions for Directed Verdict. R., Vol. IX, pp. 774, 933. The causes of action were submitted to the jury.

The trial court instructed the jury in its "Statement of the Case" Instruction that Zinke & Trumbo denied they owed Diamond Shamrock any money under the operating agreement because Diamond Shamrock failed to drill and complete the well in a good and workmanlike manner. R., Vol. I, pp. 240-41. The trial court instructed the jury that Diamond Shamrock must have substantially performed its duties under the terms and conditions of the operating agreement in order to recover on its claim for well costs. Instruction No. 4, Vol. I, p. 246.

The jury was also instructed that, in order to find for Zinke & Trumbo on their claim of gross negligence, they must find that Diamond Shamrock failed to conduct its operations in a good and workmanlike manner. Instruction No. 8, R., Vol. I, p. 251. In order to find in favor of Hamilton, Francis and Richardson on their claim of negligence, the jury was required to find that Diamond Shamrock failed to exercise ordinary care in the drilling and completion of the well. Instruction No. 9, R., Vol. I, p.252.

In order to find in favor of Hamilton and Francis on their claim of breach of the implied covenant to protect against drainage, the jury was required to find that Diamond Shamrock caused substantial drainage, that they made demand upon Diamond Shamrock to protect the premises against drainage and that Diamond Shamrock delayed an unreasonable length of time in protecting the premises as demanded. Instruction No.12, R., Vol. I, pp. 266-67. In order to find in favor of Hamilton and Francis on their claim of breach of the implied covenant to market, the jury was required to find that the well was capable of producing oil or gas in paying quantities, that they made demand upon Diamond Shamrock to comply with the covenant to market, and that Diamond Shamrock failed to exercise reasonable diligence in marketing oil or gas produced from the well. Instruction No. 11, R., Vol. I, pp. 264-65.

No special interrogatories were requested or submitted to the jury. The verdict form is reprinted in the Appendix hereto, App. H. The jury returned a verdict finding in favor of Diamond Shamrock and against Zinke & Trumbo for the full amount of Zinke& Trumbo's share of unpaid well costs in the amount of $212,805.60. The jury returned a verdict against Diamond Shamrock and in favor of Zinke & Trumbo on their claim of gross negligence in the amount of $995,196.00, and in favor of Hamilton, Francis and Richardson on their claim of negligence in the amount of $971,179.00.

The jury found for Diamond Shamrock on Hamilton and Francis' claim for breach of the implied covenant to market. The jury found in favor of Hamilton and Francis on their claim of breach of implied covenant to protect against drainage and awarded actual damages of $32,499.00 and punitive damages of $1,000,000.00.

Diamond Shamrock timely filed an Alternative Motion for Judgment Notwithstanding the Verdict or For New Trial, based on several grounds. App. I. The only error regarding inconsistency in the jury's verdict alleged by Diamond Shamrock pertained only to the jury's findings in favor of Diamond Shamrock on its claim and in favor of Zinke & Trumbo on their claim of gross negligence and in favor of Hamilton, Francis and Richardson on their claim of negligence. On January 11, 1984, the trial court issued its order granting a new trial on all of the claims which were submitted to the jury, using the following language:

> "The Court, after hearing the authorities presented and the argument of counsel, finds that the Motion for Judgment Notwithstanding the Verdict should be denied and that the Motion for New Trial should be granted in all respects." App. D.

At the hearing held on Diamond Shamrock's Alternative Motion for Judgment Notwithstanding the Verdict or New Trial, Diamond Shamrock's counsel asserted several grounds in support of its Motion, including that there was no evidence to support certain essential elements of Respondents' counterclaims. Although the judge commented that he thought that the verdict was inconsistent on all claims, during the course of the arguments he stated that he believed the verdict was inconsistent only with respect to Diamond Shamrock's claim and Respondents' counterclaims for gross negligence and negligence. R., Vol. XI, pp. 6-7, 32. Further, just prior to making his comment about inconsistency the judge stated:

> "Then, I'll tell you, gentlemen, I have looked at this and looked at it, and I don't see anything for the Court to do in keeping with my oath, as busy as we are, except just to order the whole thing retried.
>
> I'm going to grant you a new trial on all issues. Now, we might be able to clean the issues up a little bit more. That will reopen discovery and maybe have another pretrial, but I guess that jury either was confused or they didn't understand the instructions. Or they were confused on what the evidence was." App. J.

A second jury trial began on February 11, 1985, before the same trial judge. On February 19, 1985, the jury returned a verdict finding only in favor of Diamond Shamrock on its claim against Zinke & Trumbo for the full amount of Zinke & Trumbo's share of unpaid well costs in the amount of $220,830.34. Exhibit"A" of App. C. The jury in the second trial, following the trial court's instructions, filled in the blanks on the verdict form pertaining to Diamond Shamrock's claim and did not fill in the blanks pertaining to any of the counterclaims.

Thereafter, Respondents filed a Motion to Reinstate the Original Verdict rendered in the case. In the alternative, they sought a new trial, alleging that the verdict rendered in the second trial was defective. The trial court denied both motions.

Diamond Shamrock filed a Motion for Judgment with respect to Hamilton and Francis' claims for breach of the implied covenants to market and to protect against drainage. The trial court denied Diamond Shamrock's Motion and granted a new trial on its own motion on those two claims, finding that the jury failed to return a verdict on those claims. App. B. The trial court entered a final judgment in favor of Diamond Shamrock on all other claims. App. C.

Proceedings Below—Introduction.

On April 18, 1985 the trial court entered an interlocutory order and a final judgment, disposing of the parties' claims as follows. The trial court:

1. on its own motion granted a new trial on Hamilton and Francis' counterclaim for breach of the implied covenant to market (App. B);

2. on its own motion granted a new trial on Hamilton and Francis' counterclaim for breach of implied covenant to protect against drainage (App. B);

3. entered judgment on the jury's verdict in favor of Diamond Shamrock on its claim for unpaid well costs and against Zinke & Trumbo in the amount of $220,830.34 (App. C);

4. entered judgment on the jury's verdict in favor of Diamond Shamrock on Zinke & Trumbo's counterclaim for gross negligence (App. C); and

5. entered judgment on the jury's verdict in favor of Diamond Shamrock on Hamilton, Francis and Richardson's counterclaim for negligence (App. C).

The trial court certified its interlocutory order granting a new trial on its own motion on Hamilton and Francis' counterclaims for breach of the implied covenants (Paragraphs 1 and 2 above) for immediate appeal pursuant to 28 U.S.C. §1292(b). App.B. That certified interlocutory order is the subject of the appeal below and of this Petition.

The trial court also certified its judgment on all other claims (Paragraphs 3 through 5 above) as final pursuant to Fed. R. Civ. P. 54(b). App. C. The final judgment on the claims described in Paragraphs 3 through 5 above is the subject of a separate appeal which is still pending before the Tenth Circuit.[2]

The only claims involved in the appeal below were the counterclaims of Hamilton and Francis for breach of the implied covenants. However, because the Tenth Circuit decided issues raised and briefed only in the separate appeal from the final judgment on all other claims, it is necessary to briefly describe how the issues arose in both appeals.

Proceedings Below—Appeal From Certified Interlocutory Order.

Diamond Shamrock filed a Petition for Permission to Appeal the certified interlocutory order which is the subject of the appeal below in the Court of Appeals pursuant to 28 U.S.C. §1292(b). App. K. Diamond Shamrock raised issues pertaining to the trial court's granting of a new

---

[2] The last brief on the merits of the appeal from the final judgment was filed on May 22, 1986, the day after the Court of Appeals issued its Opinion in the appeal below from the certified interlocutory order. In a letter dated June 9,1986, the Court of Appeals in that separate appeal from the final judgment requested the parties to respond to the following questions: (1) whether oral argument is necessary, and (2) what effect if any, the Tenth Circuit Court of Appeals' decision in the appeal from the interlocutory order had on the appeal from the final judgment. Both parties filed responses. No further action has been taken by the Tenth Circuit Court of Appeals in that appeal and it is still pending.

trial on its own motion after the second trial on Hamilton and Francis' claims for breach of the implied covenants to market and to protect against drainage and the denial of Diamond Shamrock's Motion for Judgment on those claims.

Hamilton and Francis also filed a Petition for Permission to Appeal the certified interlocutory order, raising as their sole issue the trial court's alleged error in granting a new trial after the first trial on their counterclaim for breach of the implied covenant to protect against drainage. App. M. Hamilton and Francis also stated in their Petition for Permission to Appeal that: "Included in said Certified Interlocutory Order is the Order sought to be appealed hereby, to wit, the Order of the District Court entered January 11, 1984, granting a new trial with respect to counterclaimants' claim for drainage." App. M.

The court of appeals granted both Petitions for Permission to Appeal. In Hamilton and Francis' Docketing Statement they again asserted, as their sole issue, the trial court's alleged error in granting a new trial after the first trial on their counterclaims for breach of implied covenants. App. N.

In their Answer Brief, however, Hamilton, Francis and Richardson, addressed the issue of whether the trial court erred in granting a new trial after the first trial on their counterclaim of negligence. Diamond Shamrock responded by stating that the granting of a new trial after the first trial on the negligence claim was not decided by the interlocutory order, but was properly raised only in the separate appeal from the final judgment on that claim.

Separate Appeal From Final Judgment.

As discussed above, the trial court certified as final its judgment in favor of Diamond Shamrock on all claims except Hamilton and Francis' counterclaims for breach of implied covenants. In its Rule 54(b) certification, the trial

court stated that the claims certified as final were "separate, distinct and independent from" Hamilton and Francis' counterclaims for breach of the implied covenants.

All Respondents filed a separate appeal from that final judgment. App. O. Diamond Shamrock filed a cross-appeal. App. P. That appeal is still pending before the Court of Appeals.

In the appeal from the final judgment, all parties briefed the issue of whether the trial court erred in granting a new trial (after the first trial) with respect to Diamond Shamrock's claim for well costs and with respect to Zinke & Trumbo's counterclaim for gross negligence and Hamilton, Francis and Richardson's counterclaim for negligence.

Decision Below.

On May 21, 1986, a panel of the Court of Appeals for the Tenth Circuit issued its opinion in the appeal from the certified interlocutory order, reversing the trial court's order granting a new trial after the first trial and remanding the case with instructions that the district court reinstate the verdict of the jury returned at the first trial on all claims and enter judgment thereon. App. A. In its opinion, the Court of Appeals stated that the appeal was from a judgment containing an interlocutory order certified pursuant to Fed. R. Civ. P. 54(b). The court also stated that jurisdiction vested pursuant to 28 U.S.C. §1292(b).

The principal opinion (Barrett, C.J.) holds that the verdict in the first trial came within the provisions of Fed. R. Civ. P. 49(b) and that Diamond Shamrock waived any error in that verdict by failing to object on the grounds of inconsistency prior to the time the jury was discharged. The principal opinion finds that such waiver is dispositive of that appeal as well as the pending appeal from the final

judgment. Respondents raised the issue of waiver for the first time in their briefs on appeal.[3]

The principal opinion also holds that the trial court erred in finding that the jury's verdict was inconsistent. The Court of Appeals states that the trial court entered its order granting a new trial after the first trial based upon Diamond Shamrock's Motion for New Trial. The Court of Appeals held that the verdict was not inconsistent. The Court of Appeals did not address any other ground raised by Diamond Shamrock in its Motion for New Trial, nor did it address any of the grounds raised by Diamond Shamrock in support of its Motion for Judgment Notwithstanding the Verdict.

One of the panel members (McKay, C.J.) dissented from that portion of the opinion which found that the verdict was submitted under Fed. R. Civ. P.49(b) and that Diamond Shamrock waived any inconsistency in the verdict, but concurred in the result reached. The third panel member (Tacha, C.J.) concurred in the portion of the court's opinion that found that the verdict was not inconsistent and stated that it was unnecessary to reach the Rule 49 question.

Diamond Shamrock's Petition for Rehearing and a Suggestion for Rehearing *en banc*, were denied by the Court of Appeals on July 16, 1986. App. F and G. In its order denying rehearing, the Court of Appeals, for the first time, addressed one of the issues raised by Diamond Shamrock in support of its entitlement to judgment notwithstanding the verdict, to-wit, the failure to make demand to comply

---

[3] Respondents did not raise the issue of waiver (1) in their Brief in Opposition to Diamond Shamrock's Alternative Motion for Judgment Notwithstanding the Verdict filed after the first trial, (2) at the hearing held on Diamond Shamrock's Motion for New Trial after the first trial, (3) in their Motion to Reconsider the decision to grant a new trial filed after the first trial, or (4) in their Motion to Partially Reinstate the Original Verdict filed after the second trial.

with the implied covenants. The Court of Appeals stated that Oklahoma law does not require "demand for payment" as a prerequisite to filing a suit for damages.[4] App. F and G.

REASONS FOR GRANTING THE WRIT

I. a. The Tenth Circuit's Decision that a Verdict Not Accompanied With Special Interrogatories Falls Within Fed. R. Civ. P. 49(b) and that a Party Waives Inconsistency in Such a Verdict is in Direct Conflict With Decisions of Other Circuits and Raises a Recurring and Important Question of Procedure Concerning Fed. R. Civ. P. 49.

The verdict form in this case allowed the jury to find for or against the parties on each claim submitted to the jury and to fill in a dollar amount of damages with respect to each claim. No special interrogatories were submitted along with the verdict form. App. H. The Tenth Circuit has extended the coverage of Fed. R. Civ. P. 49(b) beyond its express provisions to verdicts which are not accompanied by any special interrogatories. The Tenth Circuit, in extending the rule beyond its provisions, has upset a trial court's order granting a new trial by applying the harsh rule of waiver.

The Tenth Circuit's decision is in direct conflict with decision of the Fifth Circuit in *Mercer v. Long Mfg. N.C., Inc.*[5] In *Mercer*, the Fifth Circuit considered a verdict which

---

[4] Diamond Shamrock stated as one of its grounds for Suggestion for Rehearing In Banc that the issue of whether demand is a prerequisite to recovery of damages for breach of implied covenants of an oil and gas lease had been certified to the Oklahoma Supreme Court by the United States District Court for the Western District of Oklahoma by Order dated April 18, 1985, in the case of *Wilda Fern Good, et al. v. Union Oil Co. of California et al.*, Case No. 64,384, before the Oklahoma Supreme Court.)

[5] 665 F.2d 61 (5th Cir. 1982) and 671 F.2d 946 (5th Cir. 1982) (rehearing denied).

allowed the jury to find for either party on three claims asserted by the plaintiff and to fill in the amount of damages,[6] and the effect of Fed. R. Civ. P.49 upon the verdict. The court held that the jury's verdict was inconsistent and remanded the case for a new trial. In a subsequent opinion denying rehearing in the same case, the Fifth Circuit held that a party does not waive inconsistency in that type of a verdict by failing to object prior to the discharge of the jury. In so doing, the Fifth Circuit stated that there is no sound reason to predicate the right to review on such a formality.

Equally in conflict with the decision below is *Malley-Duff &Associates, Inc. v. Crown Life Insurance Co.*,[7] wherein the Third Circuit expressly held that a verdict which allowed the jury to find whether a defendant was liable or not liable on each of several claims and to fill in an amount of damages if they found for the plaintiff, did not fall within the provisions of Rule 49(b). The court held that Rule 49(b) only pertained to general verdicts accompanied by answers to interrogatories. The court also held that a party does not waive the right to assert that the verdict was inconsistent by failing to object to the verdict prior to the time the jury is discharged.[8]

In *Ladnier v. Murray*,[9] the Fourth Circuit expressly held that a party did not waive inconsistency in a jury's verdict rendered under Rule 49(a) by failing to object prior to discharge of the jury.[10] This same result was reached by

---

[6] 665 F.2d 61, 64 n.8.

[7] 734 F.2d 133, 144 n.3 and 145 (3rd Cir. 1984), *cert. den.*, 105 S. Ct. 564, 83 L. Ed.2d 505, 53 U.S.L.W. 3417 (1984).

[8] *Id.* at pp. 144-45.

[9] 769 F.2d 195, 198 n.3 (4th Cir. 1985).

[10] *See also, Brunner v. Maritime Overseas Corp.*, 779 F.2d 296(5th Cir. 1986), *cert. den.*, 106 S. Ct. 1971, 90 L. Ed.2d 655, 54 U.S.L.W. 3761 (1986); *Fugitt v. Jones*, 549 F.2d 1001 (5th Cir. 1977) (wherein

the Eleventh Circuit, without expressly discussing waiver, in *Burger King Corp. v. Mason.*[11] There, the Eleventh Circuit affirmed the trial court's granting of a new trial and addressed the issue of inconsistency of the verdict even though the parties did not request that the issue be resubmitted to the jury for clarification and, as a result, the jury was discharged without the opportunity to correct the inconsistencies, "leaving the district court with the difficult task of interpreting the verdict."[12]

The verdict in the instant case was in the same format as the verdicts involved in *Mercer* and *Malley-Duff.* The Fifth Circuit and the Third Circuit held in those cases that such a verdict was a special verdict falling within the provisions of Fed. R. Civ. P. 49(a) and that the rule of waiver applied by courts to verdicts under Fed. R. Civ. P. 49(b) did not apply to special verdicts. The Tenth Circuit's decision is in direct conflict with those decisions. If the verdict in this case is considered to be a general verdict on several claims, it does not fall within the provisions of Fed. R. Civ. P. 49(a) or (b), and the decision of the Tenth Circuit is in conflict in principle with decisions of other circuits which hold that a new trial is mandatory if general verdicts are inconsistent.[13] It is also inconsistent

---

the Court stated that inconsistencies in the jury's verdict did not even need to be raised in a motion for new trial or a motion for judgment notwithstanding the verdict, but could be addressed when raised for the first time on appeal).

[11] 710 F.2d 1480 (11th Cir. 1983), *reh. den.*, 718 F.2d 115 (11th Cir. 1983), *cert. den.*, 465 U.S. 1102, 104 S. Ct. 1599, 80 L. Ed.2d 130 (1984).

[12] *Id.* at 1488.

[13] *Hopkins v. Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970); *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975); *Werner v. Upjohn Co.*, 628 F.2d 848, 860 (4th Cir. 1980), *cert. den.*, 449 U.S. 1080, 101 S. Ct. 862, 66 L. Ed.2d 804 (1981); *Turner v. "The Cabins," Tanker, Inc.*, 327 F. Supp.515, 519 (D.C. Del. 1971); *McCormick v. City of Wildwood*, 439 F. Supp. 769, 774 (D.C. N.J. 1977). *See also, Cheney*

with a decision of the Sixth Circuit holding that a motion for new trial is sufficient to raise an objection to the inconsistency between general verdicts.[14]

There are several reasons for not applying the harsh rule of waiver of the right to assert that a special verdict, or general verdicts not accompanied by special interrogatories, is inconsistent by failure to object prior to the time the jury is discharged. The use of special interrogatories under Fed. R. Civ. P. 49(b) puts counsel on notice that the provisions of that rule apply.[15] Rule 49(b) explicitly authorizes the court to return the jury for further consideration of its verdict if it is inconsistent, while Rule 49(a) contains no similar provision.[16] The judge has three choices under the provisions of Fed. R. Civ. P. 49(b) if there are inconsistencies between the answers to special interrogatories and the general verdict: (1) the court may enter judgment pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, (2) the court may return the jury for further consideration of its answer and verdict, or (3) the court may order a new trial.

Rule 49(a) does not expressly provide for these options. With regard to general verdicts which do not fall within Rule 49, there is no procedural rule which requires counsel to object before the time the jury is discharged. The Tenth

---

v. Moler, 285 F.2d 116, 118 (10th Cir. 1960) (wherein the court held that a party does not waive error by failing to object to inconsistencies in general verdicts rendered in the same case by failing to object prior to discharge of the jury).

[14] *Pugh v. Bluff City Excursion Co.*, 177 F. 399 (6th Cir. 1910).

[15] *Fernandez v. Chardon*, 681 F.2d 42, 58 (1st Cir. 1982), *aff'd., Chardon v. Fumero Soto*, 462 U.S. 650, 103 S. Ct. 2611, 77 L. Ed.2d 74 (1983).

[16] *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.*, 734 F.2d 133 (3rd Cir. 1984), *cert. den.*, 105 S. Ct. 564, 83L. Ed.2d 505, 63 U.S.L.W. 3417 (1984); *Griffin v. Matherne*, 471 F.2d 911, 918 n.6 (5th Cir. 1973), *reh. den.*, 474 F.2d 1347 (5th Cir. 1973).

Circuit's judicial expansion of Fed. R. Civ. P. 49(b) operates to penalize a party by invoking the harsh rule of waiver to overturn a trial court's order granting a new trial.

Fed. R. Civ. P. 59 allows a trial court to grant a new trial for any of the reasons which pertained at common law. An inconsistency in the jury's general verdicts is recognized as a ground for granting a new trial at common law.[17] Under Fed. R.Civ. P. 59, counsel has 10 days within which to file a motion for new trial, which gives counsel time to think of all grounds which support the granting of a new trial. Under Fed. R. Civ. P. 49(b), where a jury is requested to answer specific factual findings, the inconsistencies are more likely to be obvious. This is not the case with a general verdict or special verdicts under 49(a).[18]

The Tenth Circuit, by extending coverage of Rule 49(b) to encompass verdicts which are not accompanied by any special interrogatories, has created confusing precedent. It is a precedent directly at odds with decisions of the Third and Fifth Circuits. Further, the issue of waiver of the inconsistencies in a jury's civil verdict is a recurring and

---

[17] *Global Van Lines, Inc. v. Nebeker*, 541 F.2d 865, 868 (10th Cir. 1976); *Hopkins v. Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970); 6A *Moore's Federal Practice*, Para. 59.08[1] at p. 59-81 (1985); *Burkett v. Moran*, 410 P.2d 876 (Okl. 1965).

[18] *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1041 n.2 (5th Cir. 1982) (wherein the Court stated: "In the instant case, the inconsistencies in the special interrogatories . . . in light of the Court's general charge, were not so blatant that the parties would have immediately perceived while the jury was present that a judgment could not be entered upon them); *Guidry v. Kem Mfg. Co.*, 598 F.2d 402, 405 n.2 (5th Cir. 1979), *reh. den.*, 604 F.2d 320 (5th Cir. 1979), *cert. den.*, 445 U.S. 929, 100 S. Ct. 1318, 63 L.Ed.2d 1318 (1980) (wherein the Fifth Circuit speculated that counsel did not request resubmission of the verdict to the jury perhaps because the "$1.5 million eruption so stunned them that their reactions were slowed." Nevertheless, the Court remanded the case for new trial because of inconsistency in the jury's special verdict).

important question and a writ of certiorari should be granted to provide guidance to lower courts. Rule 49(b) is specific and does not apply to the verdict involved in this case. The Tenth Circuit's application of the doctrine of waiver makes clients' substantial rights in cases being tried in the federal courts every day dependent upon their counsel's split second decisions to be made before the jury is discharged as to whether the verdict is inconsistent and whether the circuit he is before applies the rule of waiver.

b. The Tenth Circuit's Reversal of the Trial Court's Order Granting a New Trial is in Direct Conflict With a Decision of the Seventh Circuit and is in Conflict With Established Case Law Holding that the Trial Court Has Broad Discretion in Granting a New Trial.

Diamond Shamrock's Motion for New Trial was based on several grounds. App. I. The trial court granted Diamond Shamrock's Motion in all respects. App. D.

The Tenth Circuit, by reversing the trial court's order granting a new trial, has infringed upon the trial court's broad discretion in granting a new trial. Even if the Tenth Circuit was correct in applying Fed. R. Civ. P. 49(b) to a situation where it does not apply, the trial court nevertheless had the discretion to grant a new trial for inconsistency of the verdict, especially where the opposing party did not raise the issue of waiver before the trial court.

The Tenth Circuit's opinion is in direct conflict with *Cundiff v. Washburn.*[19] In *Cundiff*, the Seventh Circuit held that, in the absence of objection by counsel, the trial court alone has the discretion to choose the means of correcting the inconsistency of the verdict under Fed. R. Civ. P. 49(b), which includes the option of granting a new trial.[20]

---

[19] 393 F.2d 505 (7th Cir. 1968).

[20] *Id.* at 507.

In each of the cases relied upon by the Tenth Circuit in the principal opinion, the appellate court *affirmed* the trial court's refusal to grant a new trial. Appellate courts have held that even where a trial court would have been justified in granting a new trial because a verdict was inconsistent, they would not disturb the trial court's decision on appeal.[21] This result is consistent with the general rule that because the trial judge has first hand knowledge of the case, the trial judge is in the best position to pass upon the question of a new trial in light of the evidence and the charges to the jury.[22]

The Tenth Circuit's decision also infringes upon the trial court's discretion by assuming that the sole basis that the trial court granted a new trial was because of inconsistency of the jury's verdict and by holding that the jury's verdict was not inconsistent. The granting of a new trial is not in derogation of the right to a trial by jury, but is one of the historic safeguards of that right.[23] The trial court may order a new trial on its own motion under Fed. R. Civ. P.59(d) if it suspects that the jury verdict reflects confusion, and that decision can only be reversed for a clear abuse of discretion.[24] In *Schneider v. Lockheed Aircraft Corp.*,[25] the court held that the trial court has the discretion to grant a new trial when the jury is confused. The court further held that the appellate court's failure

---

[21] *International Longshoremen's & Warehousemen's Union v. Hawaiian Pineapple Co.*, 226 F.2d 875, 881 (9th Cir. 1955), *cert. den.*, 351 U.S. 963, 76 S. Ct. 1026, 100 L. Ed. 1483 (1956); *Lansburgh & Bro., Inc. v. Clark*, 75 App. D.C. 339,127 F.2d 331, 333 (1942).

[22] *Iacurci v. Lummus Co.*, 387 U.S. 86, 88, 87 S. Ct. 1843, 18 L. Ed.2d 581 (1967).

[23] *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 353-54(4th Cir. 1941); *Holmes v. Wack*, 464 F.2d 86, 88 n.1 (10th Cir. 1972).

[24] *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d '1530, 1538 (5th Cir. 1984).

[25] 212 App. D.C. 87, 658 F.2d 835, 849-50 (1981).

to find confusion is not dispositive because (1) the trial judge is in the best position to observe the trial and (2) the scope of review is narrow.

In the instant case, Diamond Shamrock asserted several grounds which would support judgment notwithstanding the verdict or new trial. App. I. The trial court had the power to grant a new trial because of insufficiency of the evidence even where it denied a motion for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b). The order granting a new trial stated that it granted Diamond Shamrock's Motion for New Trial "in all respects." That order controls.[26] In *Community National Life Insurance Co. v. Parker Square Savings & Loan Association*,[27] the judge stated that: "I don't know why except that I was just not satisfied."[28] The Seventh Circuit sustained the order granting a new trial, pointing out that the motion for new trial was based on eight specific grounds and the order granting the new trial recited that the order was based upon the grounds stated in the motion.

The Tenth Circuit also infringed upon the trial court's discretion by holding that the jury's verdict was not irreconcilably inconsistent. If, after a review of the record, the jury's answers may not "fairly be said to represent a logical and probable decision on the relevant issues as submitted," the jury's verdict is inconsistent and a new trial should be granted.[29] Even though the verdict may not appear inconsistent on the surface, it may become so in

---

[26] *Segars v. Atlantic Coast Line Railroad Co.*, 286 F.2d 767,770 (4th Cir. 1961); *Gay v. United States*, 118 F.2d 160, 161 (7th Cir. 1941).

[27] 406 F.2d 603 (10th Cir. 1969).

[28] *Id.* at 605.

[29] *Fugitt v. Jones*, 549 F.2d 1001, 1005 (5th Cir. 1977); *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973), *reh. den.*, 474 F.2d 1347 (5th Cir. 1973); *Burger King Corp. v. Mason*, 710 F.2d 1480, 1489 (11th Cir. 1983), *reh. den.*, 718 F.2d 1115 (11th Cir. 1983), *cert. den.*, 465 U.S. 1102, 104S. Ct. 1599, 80 L. Ed.2d 130 (1984).

light of the instructions,[30] which the jury is assumed to act in accordance with.[31]

Under the evidence and instructions in this case, the jury was required to find that Diamond Shamrock incurred the well costs in a good and workmanlike manner in order to find for Diamond Shamrock on its claim for recovery of such well costs. Under the instructions and the evidence at the first trial, Respondents were entitled to recover damages on their claims of negligence and gross negligence only if Diamond Shamrock failed to prudently conduct the identical operations. The jury's verdict in favor of Diamond Shamrock at the first trial was a finding that Diamond Shamrock incurred the completion costs in a good and workmanlike manner. That finding cannot be reconciled with the jury's findings in favor of Respondents that Diamond Shamrock was negligent and grossly negligent in the same operations for which Diamond Shamrock sought to recover costs.

The Tenth Circuit, relying on a statement made by Zinke in his cross examination, states that the jury could have believed that Diamond Shamrock was entitled to recover well costs even if they were negligently or grossly negligently incurred. Zinke merely testified that the non-operator, under the accounting procedures attached to the operating agreement, was required to pay its bills within 15 days of receipt from the operator. Zinke stated that the payment of well costs under that requirement would not be excused merely because he decided on his own that the operator was negligent. That requirement does not support a finding that Zinke & Trumbo were liable for such costs no matter how negligently incurred. Indeed, under the operating agreement, Diamond Shamrock could

---

[30] *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 66 (5th Cir. 1982), *reh. den.*, 671 F.2d 946 (5th Cir. 1982).

[31] *City of Los Angeles v. Heller*, 475 U.S. ____, 106 S. Ct. 1571, 89 L. Ed.2d 806, 54 U.S.L.W. 3693 (1986).

have required Zinke & Trumbo to pay their share of estimated well costs before the expenditures were even incurred.

The Tenth Circuit's holding is contrary to the principles set forth by this Court that "juries act in accordance with instructions given them and that they do not consider and base their decisions on legal questions with respect to which they are not charged."[32] The extent to which the Tenth Circuit infringed upon the trial court's broad discretionary powers in this case merits this court's attention.

II. The Tenth Circuit, by Deciding Issues Properly Raised and Fully Briefed Only in a Separate Appeal and by Failing to Decide Issues Raised on Appeal Pertaining to Diamond Shamrock's Entitlement to Judgment Notwithstanding the Verdict, has so far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision.

The Tenth Circuit reinstated a multi-million dollar verdict in this case on the ground of a procedural technicality, without even addressing issues which were raised by Diamond Shamrock and supported by authorities and citations to the record. The Tenth Circuit misunderstood the procedural history and issues involved in this case. The Tenth Circuit's confusion is shown by its statement that this appeal was from a final judgment, containing an interlocutory order, certified under Fed. R. Civ. P. 54(b). App. A. This appeal was from an interlocutory order certified under 28 U.S.C. §1292(b).

The only two claims involved in the interlocutory appeal below were Hamilton and Francis' claim for breach of the implied covenants to protect against drainage and to market. The order granting a new trial after the first trial

---

[32] *City of Los Angeles v. Heller*, 475 U.S. ____, 106 S. Ct. 1571, 89 L. Ed.2d 806, 810, 54 U.S.L.W. 3693 (1986).

was reviewable in the appeal below only with respect to the two implied covenant claims.[33]

A final judgment was rendered after the second trial in favor of Diamond Shamrock on all claims other than Hamilton and Francis' claims for breach of implied covenants. That judgment was certified under Fed. R. Civ. P. 54(b) and is the subject of a separate appeal still pending before the Tenth Circuit. The propriety of the interlocutory order granting a new trial after the first trial on all claims upon which the final judgment was rendered is subject to review as part of the separate appeal from that final judgment.[34] However, the Tenth Circuit in its decision below addressed issues which were fully briefed only in the separate appeals.

The Tenth Circuit's confusion is also evidenced by its statement that Diamond Shamrock's Motion for New Trial after the first trial was based on inconsistency of the jury's verdict and that the sole issue dispositive of the appeal was waiver of the right to assert inconsistency of the jury's verdict. Diamond Shamrock never asserted that the jury's verdict on the two implied covenant counterclaims of Hamilton and Francis were inconsistent with the jury's verdict on the remaining claims. Although Diamond Shamrock asserted several grounds in support of its Alternative Motion for Judgment Notwithstanding the Verdict or New Trial with respect to Hamilton and Francis' implied covenant claims, none of those grounds was based on inconsistency of the jury's verdict with regard to Hamilton and Francis' claims for breach of the implied covenants. The Tenth Circuit's opinion is thus contrary to the trial court's order granting a new trial on the implied covenant claims after the first trial.

---

[33] *United States v. Ft. Sill Apache Tribe of the State of Oklahoma*, 205 Ct. Cl. 805, 507 F.2d 861, 864 (1974).

[34] *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101S. Ct. 188, 66 L. Ed.2d 193 (1980).

Diamond Shamrock asserted in the trial court and on appeal that there was no evidence to support certain essential elements of all of Respondents' counterclaims. To reinstate the jury's verdict without even addressing those issues is arbitrary and contrary to rational justice.[35] A judgment supported by no evidence on an essential element violates due process.[36]

With respect to the interlocutory order granting a new trial on Hamilton and Francis' implied covenant claims, Diamond Shamrock pointed out there was no evidence to support the essential elements of those claims. Hamilton and Francis did not testify. Neither the oil and gas leases nor their terms were introduced into evidence. Under Oklahoma law, implied covenants are implied in fact from the express terms of the oil and gas lease.[37] To construe an oil and gas lease, the court is required to determine the parties' intent as manifested by the express provisions of the contract.[38] An implied covenant may only be implied where the express provisions of an oil and gas lease do not provide otherwise.[39] Further, it is a well-settled prin-

---

[35] *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1913).

[36] *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 304 n.55 (3rd Cir. 1983), *later proc.*, 723 F.2d319 (3rd Cir. 1983), *rev'd. on other grds., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ___ U. S. ___, 106 S. Ct. 1348, 89 L. Ed.2d 538, 54 U.S.L.W. 4319 (1986); *Thompson v. City of Louisville*, 362 U.S. 199, 206,80 S. Ct. 624, 4 L. Ed.2d 654 (1960).

[37] *Indian Territory Illuminating Oil Co. v. Rosamond*, 190 Okl. 46, 120 P.2d 349 (1941).

[38] *Farmers' Mutual Oil Leasing Co. v. Bonneau*, 110 Okl. 168,237 P. 83, 84 (1924); *State ex rel. Commissioners of the Land Office v. Couch*, 298 P.2d 452 (Okl. 1956).

[39] *Adkins v. Adams*, 152 F.2d 489 (7th Cir. 1945); *Brimmer v. Union Oil Co. of California*, 81 F.2d 437, 440 (10th Cir. 1936), *cert. den.*, 298 U.S. 668, 56 S. Ct. 833, 80 L. Ed. 1391 (1936); *Witt v. Westheimer*, 182 Okl. 645, 79 P.2d 250(1938).

ciple of law that, in an action for damages for breach of contract, the contract or its terms and conditions must be in evidence and the plaintiff has the burden of proving such terms.[40]

Further, demand to comply with the implied covenants was an essential element of Hamilton and Francis' claims for breach of implied covenants under the Instructions to the jury. R., Vol. I, pp. 264-67. It was undisputed that no demand was made. It was pointed out to the Tenth Circuit that this issue has been certified to the Oklahoma Supreme Court by the United States District Court for the Western District of Oklahoma. The Oklahoma Supreme Court is expected to rule on this issue at any time. It is Diamond Shamrock's position that such demand is necessary.[41]

Diamond Shamrock also pointed out that Hamilton and Francis failed to prove the essential element that Diamond Shamrock failed to act as a prudent operator in drilling the John Hamilton No. 1-33 Well. Diamond Shamrock also asserted that there was absolutely no evidence of the essential elements of substantial drainage and damages. Finally, Diamond Shamrock pointed out there was absolutely no evidence to support the award of $1,000,000.00 punitive damages for breach of the implied covenant to protect against drainage.

The Tenth Circuit abdicated its responsibilities by failing to address the issues raised by Diamond Shamrock. A writ should be granted because the Tenth Circuit drastically departed from the usual course of judicial review in reversing the trial court by deciding issues involved only in

---

[40] *National Surety Co. v. Board of Education of City of Hugo*, 36 Okl. 569, 129 P. 25, 27 (1912); *Bell v. Ralston Purina Co.*, 257 F.2d 31 (10th Cir. 1958).

[41] *Plains Petroleum Corp. v. Fine*, 174 Okl. 570, 51 P.2d 284(1935); *Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1458 (10th Cir. 1983), *later app.*, 762 F.2d 865 (10th Cir. 1985), *cert. den.*, ___ U.S. ___, 106 S. Ct. 1946, 90 L. Ed.2d 356, 54 U.S.L.W. 3729 (1986).

a separate appeal and by failing to address issues not waived by Diamond Shamrock, resulting in the reinstatement of a multi-million dollar verdict not supported by the evidence.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. If the Petitioner is correct in urging that the Tenth Circuit erred, the matter should be remanded to the Tenth Circuit for consideration of the errors raised with respect to the Order granting new trial after the second jury trial.

Respectfully submitted,

By: _____

H. B. WATSON, JR.
Counsel of Record
RICHARD K. BOOKS
SHARON TAYLOR THOMAS
WATSON & MCKENZIE
1900 Liberty Tower
Oklahoma City, OK 73102
Telephone:(405)232-2501

Attorneys for Diamond Shamrock Corporation

October 14, 1986

86-607

Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIAMOND SHAMROCK CORPORATION

Petitioner,

v.

JOHN HAMILTON, MARTHA FRANCIS, MORRIS A. RICHARDSON, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, and DAVID B. TRUMBO,

Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

H. B. WATSON, JR.
Counsel of Record
RICHARD K. BOOKS
SHARON TAYLOR THOMAS
WATSON & MCKENZIE
1900 Liberty Tower
Oklahoma City, OK 73102
(405)232-2501

Attorneys for Diamond Shamrock Corporation

October 14, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

1421

Appendix

Table of Contents

Appendix A--
Opinion of the Tenth Circuit entered July 21,1986 (reported at 791 F.2d 416) 1a

Appendix B--
Certified Interlocutory Order of District Court entered April 18, 1985 ..... 36a

Appendix C--
Journal Entry of Judgment of District Court entered April 18, 1985 ..... 41a

Appendix D--
Order of District Court granting New Trial filed January 11, 1984 ..... 48a

Appendix E--
Journal Entry of Judgment of District Court filed November 16, 1983 ..... 50a

Appendix F--
Order of Tenth Circuit denying rehearing and suggestion for rehearing en banc entered July 16, 1986 ..... 54a

Appendix G--
Order of Tenth Circuit correcting order denying rehearing and suggestion for rehearing en banc entered July 21, 1986 ..... 56a

Appendix H--
Verdict returned in first trial on November 2, 1983 ..... 58a

Appendix I--
Diamond Shamrock's Alternative Motion for Judgment Notwithstanding the Verdict or for New Trial filed November 14, 1983 ..... 60a

Appendix J--
Transcript of Hearing held on January 5, 1984 on Alternative Motion for Judgment Notwithstanding the Verdict or for New Trial 67a

Appendix K--
Diamond Shamrock's Petition for Permission to Appeal filed in Appeal No. 85-1698 on April 29, 1985 ..... 100a

Appendix L--
Diamond Shamrock's Docketing Statement filed in Appeal No. 85-1698 on June 14, 1984 .... 108a

Appendix M--
Petition for Permission to Appeal filed in Appeal No. 85-1803 on April 29, 1985 ..... 117a

Appendix N--
Docketing Statement filed in Appeal No. 85-1803 on June 10, 1985 ..... 123a

Appendix O--
Docketing Statement filed in Appeal No. 85-1653 on May 22, 1985 ..... 129a

Appendix P--
Diamond Shamrock's Docketing Statement filed in Appeal No. 85-1765 on June 3, 1985 ..... 134a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 85-1698 and 85-1803

DIAMOND SHAMROCK CORPORATION,
a Delaware Corporation,
Plaintiff-Appellant, Cross-Appellee
v.

ZINKE & TRUMBO, LTD., a business association, ROBERT M. ZINKE, an individual and DAVID B. TRUMBO, an individual,
Defendants, Counterclaimants-Appellees,
and

MORRIS A. RICHARDSON, JOHN HAMILTON and MARTHA FRANCIS,
Counterclaimants-Cross-Appellants

[May 21, 1986]

Appeal From The United States District Court For The Western District of Oklahoma (CIV-82-1754-E)

Richard K. Books (H. B. Watson, Jr., and Sharon L. Thomas with him on the briefs), Watson & McKenzie, Oklahoma City, Oklahoma, for Plaintiff-Appellant/Cross-Appellee

Richard C. Ford (Gary W. Davis, James U. White, Jr., and L. Mark Walker with him on the briefs), Crowe &

Dunlevy, Oklahoma City, Oklahoma, for Counterclaimants/ Cross-Appellants.

Before BARRETT, McKAY and TACHA, Circuit Judges.

BARRETT, Circuit Judge

This appeal and cross-appeal is from a judgment containing an interlocutory order, duly certified pursuant to Fed. R. Civ. P. 54(b). Our jurisdiction vests pursuant thereto and by virtue of 28 U.S.C. § 1292(b). There are many issues presented in this complex diversity based case. However, only one is dispositive. That involves a party's failure to object to a jury's general verdict on the ground of inconsistency prior to the discharge of the jury.

I. Factual Background

Appellees John Hamilton and Martha Francis own three-fourths of the mineral estate underlying a 640 acre tract situate in Ellis County, Oklahoma, described as Section 33, Township 23 N., Range 26 W. Their interest was leased to Diamond Shamrock. The remaining one-fourth interest is owned by appellee Morris Richardson, who leased his interest to Zinke and Trumbo, Ltd. The Oklahoma Corporation Commission established Section 33 as a 640 acre drilling and spacing unit for production from the Morrow formation.

In 1981, Diamond Shamrock, as 100 percent working interest owner, drilled and completed a well producing from the Morrow formation situate in Lipscomb County, Texas, known as the Travis Well. This well is adjacent to Section 33, *supra*. In September of 1981, Diamond Shamrock proposed the drilling of the Hamilton No. 1-33 at a location in the $SW^1/_4$ of Section 33. Zinke and Trumbo requested that Diamond Shamrock drill the well as an

offset to the Travis Well in order to protect them from drainage resulting from production from the Travis Well. Diamond Shamrock agreed and obtained a location exception from the Commission to drill the Hamilton No. 1-33 Well 317 feet from the south line and 367 feet from the west line in the SW¼ of Section 33. Diamond Shamrock and Zinke and Trumbo entered into a Joint Operating Agreement whereby Diamond Shamrock was designated as operator. The well was drilled by Diamond Shamrock to the Morrow formation and completed in September, 1982. It was reported by Diamond Shamrock as a shut-in gas well awaiting a pipeline connection. No gas has been produced and sold from the Hamilton 1-33 Well.

In the course of completion operations, a dispute arose between Diamond Shamrock and Zinke and Trumbo relative to completion procedures. This resulted in the instant litigation. On October 12, 1982, Diamond Shamrock sued Zinke and Trumbo under the terms of the Operating Agreement (breach of contract claim) for the proportionate share of costs and expenses incurred in the drilling and completion of Hamilton 1-33 Well in amount of $133,551.71, together with further accruing costs, interest thereon, costs of the action and a reasonable attorney's fee. In addition, Diamond Shamrock sought an order of foreclosure on Zinke and Trumbo's leasehold interests in satisfaction of the claim.

Zinke and Trumbo answered and denied any liability. On June 28, 1983, Zinke and Trumbo, as defendant, joined by Morris A. Richardson, John Hamilton and Martha N. Francis filed a Counterclaim against Diamond Shamrock alleging that they had been damaged because of the negligence and gross negligence of Diamond Shamrock in the completion of the well. Specifically, they alleged that Diamond Shamrock's completion attempt of the Hamilton 1-33 Well "[w]as not done in a good and workmanlike manner despite suggestions, warnings, demands, protests, and objections from Zinke and Trumbo" and that Diamond

Shamrock's "[c]ompletion attempt of the John Hamilton # 1-33 Well irreparably damaged the productive strata . . . [the Morrow formation at 8862' - 8874'] . . . underlying Section 33, by fracing into the salt water bearing strata and contaminating the productive strata with salt water constituting alleged gross neglect and willful misconduct." R. Vol. I, pp. 59, 60. Counterclaimants John Hamilton and Martha Francis sought actual and punitive damages for Diamond Shamrock's alleged breach of implied covenant of their oil and gas leases to protect against drainage and to market production from the well.

The Counterclaim further alleged that: due to the limited size of the reservoir and geological and economic conditions, a replacement well cannot be drilled on Section 33; Hamilton 1-33 Well is noncommercial; counterclaimants own no interest in the Travis #1 Well and therefore do not share in production therefrom; Travis #1 Well has been producing from the same common reservoir as the unproductive Hamilton 1-33 Well due solely to Diamond Shamrock's gross neglect; and Travis #1 Well will drain all of the hydrocarbons from the reservoir to the detriment of counterclaimants. *Id.* at 59-61.

The Counterclaim alleged, based on log calculations and production in the area, that the reserves of Hamilton 1-33 well and values to counterclaimants were: $906,100.00 to Zinke and Trumbo; $209,100.00 to Morris A. Richardson; $522,750.00 to John Hamilton; and $104,550.00 to Martha N. Francis. *Id.* at 61. A jury demand was made by the counterclaimants.

In Answer to the Counterclaim, Diamond Shamrock alleged that the Hamilton 1-33 Well "[i]s capable of producing gas in paying quantities from the Morrow formation, but that said well is shut in awaiting a pipeline connection" and that its every action with regard to Hamilton 1-33 Well has been that of a prudent operator, including every action necessary to market production from the well but,

notwithstanding, no market has been located. Further, Diamond Shamrock denied that a replacement well cannot be drilled upon Section 33, and that production from the Travis #1 Well has or will cause drainage to Section 33. *Id.* at 65-67.

Zinke and Trumbo filed an amendment to its Answer setting up Affirmative Defenses by virtue of an alleged oral agreement on February 16, 1982, with Diamond Shamrock "[a]s to the manner in which the subject well was to be completed and that Diamond Shamrock Corporation breached that agreement by completing the well in a manner different from that agreed to by Zinke & Trumbo, Ltd. and Diamond Shamrock Corporation with the result that the pay zone in the subject well was irreparably damaged and has subsequently been cemented off." *Id.* at 76. Zinke & Trumbo also filed a Second Amendment to Answer which alleged two additional affirmative defenses: (1) the offer of Zinke & Trumbo to participate in the completion attempt by Diamond Shamrock was conditioned upon a particular manner of completion which was rejected by Diamond Shamrock, thus relieving Zinke & Trumbo from any liability for completion costs, and (2) Diamond Shamrock's employees took bribes and kickbacks from suppliers and others concerning materials, supplies, and work, resulting in improper charges to Zinke and Trumbo. *Id.* at 78. An Amended Counterclaim was thereafter filed incorporating the aforesaid affirmative defenses with four additional causes of action, seeking punitive damages of $10 million. *Id.* at 80-92. These allegations were joined in denial by Diamond Shamrock's Answer. *Id.* at 101-109.

A. First Trial

The case proceeded to trial on October 27, 1983. The jury returned a verdict on November 2, 1983, as follows:

(1) for Diamond Shamrock against Zinke & Trumbo for breach of the Joint Operating Agreement (balance owing of drilling and completion costs) in amount of $212,805.60;

(2) for Diamond Shamrock and against Zinke & Trumbo upon Zinke & Trumbo's claim for breach of a new agreement (no damages awarded);

(3) for Zinke & Trumbo upon its claim against Diamond Shamrock for gross negligence and/or willful misconduct in the operation of the well in amount of $995,196.00;

(4) for counterclaimants John Hamilton, Martha Francis and Morris Richardson against Diamond Shamrock for negligence in the operation of the well in amount of $971,179.00;

(5) for Diamond Shamrock and against counterclaimants John Hamilton and Martha Francis for breach of the implied covenant to market (no damages awarded); and

(6) for counterclaimants John Hamilton and Martha Francis against Diamond Shamrock for breach of the implied covenant to protect against drainage in the amount of $32,499.00 and punitive damages in amount of $1,000,000.00.

The parties did not object to the verdict form. (R. , Vol. X, p. 43.) The court, prior to returning the jury, addressed counsel and stated that "[I] understand we have a verdict and I have sent for the jury. Due to the length of deliberation and the somewhat complexity of the verdict form, I will want to have a bench conference before I read and record the verdict and allow you all to examine it. That will be particularly true if there appears to be any inconsistencies in the verdict form." *Id.* at 45, 46. When the jury reported in, the jury's verdict was handed to the court and counsel were then called to the bench to examine the verdict before it was read and recorded. The following colloquy then occurred:

THE COURT: Any reason why the Court should not read and record the verdict?

MR. WATSON: (Counsel for Diamond Shamrock): I can think of a lot of reasons, but none that are valid.

Id. at 46.

Thereupon, the clerk read and recorded the verdict and the jury was polled. When the court inquired whether either party had any objection or any reason why the court should not then discharge the jury, respective counsel advised that there was none. *Id.* at 48. The jury was then discharged.

B. Posttrial Proceedings

On November 14, 1983, Diamond Shamrock filed an "Alternative Motion for Judgment Notwithstanding the Verdict or for New Trial." (R., Vol. II, pp. 274-281.) In its Motion for New Trial, Diamond Shamrock relied upon the ground of inconsistent verdicts. Following hearing on the motion, the trial court, after Journal Entry of Judgment, entered its "Order Granting New Trial and Vacating Judgment" on January 11, 1984 *based upon* Diamond Shamrock's Motion for New Trial. *Id.* at 286.

C. Second Trial

The second jury trial began on February 11, 1985, and on February 19, 1985, the jury returned a verdict in favor of Diamond Shamrock *only* on its claim against Zinke & Trumbo for breach of the Joint Operating Agreement in amount of $220,830.34. Thereafter, Zinke and Trumbo and the appellees filed a motion to reinstate the verdict in the first trial or, in the alternative, for new trial on the ground that the second verdict was defective in that the jury did not fill in any of the blanks pertaining to any of the counterclaims. On March 19, 1985, the trial court denied

the motion to reinstate the first verdict or for new trial. However, thereafter, by order of April 18, 1985, the trial court made its Journal Entry of Judgment and, on its finding that the jury did not return a verdict on the counterclaims of John Hamilton and Martha Francis for breaches of the implied covenants to market and to protect against drainage, the court, on its own motion, ordered that a new trial be granted to John Hamilton and Martha Francis on their counterclaims for breach of the implied covenant to market and to protect against drainage. *Id.* at 493. In that Order, the trial court noted that its oral instructions to the jury may have been erroneous, leading the jury to fail to return a verdict either for or against John Hamilton and Martha Francis on their counterclaims for breaches of the implied covenants to protect against drainage and to market. *Id.*

At the hearing on the adequacy of the second jury verdict ordered by the trial court, Diamond Shamrock urged the court to stand by the general verdict. The trial court stated that, as between Diamond Shamrock and Zinke and Trumbo he had no difficulty because, by the jury verdict, "[Y]ou won the case . . . and by so doing, the jury found that you drilled the well in a prudent way. You were not negligent, either grossly or otherwise" but "[I] do have serious reservations about the—you could be the most prudent operator in the world . . . in drilling the well . . . but still failed to market as the operator should do." (R., Vol. XVIII, p. 6.) The court concluded that it had erred in its oral instructions to the jury when "[I] told the jury if they found for the plaintiff [Diamond Shamrock] on the first item in the verdict, that ended it. And I just shouldn't have done it. Now, there's no way to cure my mistake. But I'm a little bit disappointed in you [counsel for counterclaimants] not jumping up and telling me that I was making a mistake, and I could have cured it in a moment." *Id.* at 15.

II. This Appeal and Cross-Appeal

This appeal and cross-appeal is from a judgment entered April 18, 1985, following the second trial to jury and return of a general jury verdict with findings, which rendered all claims final except those at issue here. In that respect, the judgment certified the entry of final judgment for plaintiff-appellant Diamond Shamrock Corporation (Diamond Shamrock) and against all defendants except counterclaimants-defendants John Hamilton and Martha Francis. The court found that the jury failed to return a verdict on the counterclaims of John Hamilton and Martha Francis for breaches of the implied covenants to market gas and to protect against drainage. The judgment was certified as final pursuant to Fed. R. Civ. P. 54(b).

III. Our Disposition

It is our view that the dispositive issue for our resolution is whether Diamond Shamrock 's failure to object to the first trial jury's general verdict on the ground of inconsistency before the jury was discharged constituted a waiver of that challenge. We will hold that it did. This holding necessarily impacts upon the appeal in No. 85-1653 and the cross-appeal in No. 85-1765 docketed in this court, both of which arise from the final judgment of April 18, 1985, awarding Diamond Shamrock $220,830.34 on its breach of contract claim against Zinke and Trumbo, Ltd. (Zinke and Trumbo) and the adjudication that the defendant, Zinke and Trumbo, recover nothing on its counterclaim against Diamond Shamrock for gross negligence and that the counterclaimants, John Hamilton, Martha Francis and Morris Richardson recover nothing on their claim of negligence against Diamond Shamrock.

It is interesting to note that both parties urge that we hold that the verdict of a jury be upheld in those cases where a party does not object to the verdict form after the verdict is returned and before the jury is discharged.

Diamond Shamrock asserts that the counterclaimants waived any objection to the form of the general verdict returned by the jury in the second trial by failure to object, both at the time the court explained the verdict form to the jury and after the verdict was returned and the jury polled. (Brief of Appellant, Diamond Shamrock, pp. 13-15). Diamond Shamrock relies on *Klapmeier v. Telecheck International, Inc.*, 482 F.2d 247 (8th Cir. 1973) for the rule that (a) a jury's failure to find either for or against counterclaimants on their counterclaim constitutes an adverse finding against counterclaimants, and (b) that counterclaimants waived any objection to the form of the verdict by failing to object to the verdict form or the verdict as returned so as to move for its resubmission prior to the discharge of the jury in order to provide the trial court with the opportunity to correct any matters prior to the jury's discharge. *Id.*

Cross-appellants and appellees, Morris A. Richardson, John Hamilton and Martha Francis in turn assert that during the first trial, before the jury verdict was read and entered, it was shown to counsel for all parties, who were invited by the court to object to inconsistencies, and none was lodged. Notwithstanding, the trial court granted Diamond Shamrock's Motion for New Trial on the basis of inconsistent verdicts. Thus, they assert that failure to object to a jury verdict prior to discharge of the jury constitutes a waiver of inconsistency. (Brief of Cross-Appellants and Appellees, pp. 8-10.)

Fed. Rules Civ. Proc. rule 59(a) and (d) , 28 U.S.C.A. provides, in relevant part:

> **(a) Grounds**
>
> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials

have heretofore been granted in actions at law in the courts of the United States; . . .

• • •

(d) On initiative of court

Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

Fed. Rules Civ. Proc. rule 49(b), 28 U.S.C.A. provides:

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consider-

> ation of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

The above rules, and others, must be read and construed together and harmonized whenever possible.

We have observed that both parties, at the first trial, were called to the bench after the jury returned its verdict. The trial court had previously informed counsel that the jury's general verdict should be carefully examined and any objections thereto lodged. This procedure was followed. Diamond Shamrock's counsel did not object to the jury's verdict. The first contention raised by Diamond Shamrock as to alleged inconsistency in the jury verdict came only *after* the jury had been discharged. This challenge was posited in Diamond Shamrock's "Alternative Motion for Judgment Notwithstanding the Verdict or for New Trial," predicated upon the contention that the verdicts are inconsistent on their faces.

In *Stancil v. McKenzie Tank Lines, Inc.*, 497 F.2d 529 (5th Cir. 1974), the court, dealing with an alleged inconsistency in a general verdict observed:

> Rule 49(b) does endorse a new trial as one option open to a trial court when an actual inconsistency does occur. But in determining whether Rule 49(b) requires a new trial in this case, a number of serious questions arise . . .
>
> * * *
>
> By failing to object to the form of the verdict and answers at the time they were announced by the jury, both parties waived any objection to inconsistencies under Rule 49 (b) . . . the trial

> judge was careful to solicit objections from both counsel after the verdict was rendered and the interrogatories answered. . . . Had an objection been raised as to the inconsistency of the answers at that time, the district court could have elected to "return the jury for further consideration of its answers and verdict. . . ."

497 F.2d at pp. 533-35.

We agree with the reasoning of the *Stancil* court. In an analogous setting, we held in *Kirkendoll v. Neustrom*, 379 F.2d 694, 699 (10th Cir. 1967), that appellant waived his objection to special interrogatories:

> The record reflects that after the special answers and verdict were read, the court asked if there was any reason why the jury should not be discharged. Both appellant and appellee answered in the negative. The jury was discharged. Under this rule, [49(b) Fed. R. Civ. P.], as well as by acquiescence of counsel in the action of the court, no reversible error occurred. . . .

Cundiff v. Washburn, 393 F.2d 505 (7th Cir. 1968) , dealt with the question whether a party who is disenchanted with the general verdict but who *did not* move for resubmission pursuant to Rule 49(b) before the jury was discharged waives the right to have alleged inconsistencies in the general verdict remedied by a new trial. The *Cundiff* court observed that our *Kirkendoll v. Neustrom, supra*, was "closely analogous," and held:

> Consistent with the rationale of these cases, we hold that appellant waived any objection to the verdict on the ground of inconsistency with the special finding by failing to move the resubmission of the verdict and finding to the jury. Any other decision would hamper the just and efficient operation of the federal courts. It would

> encourage jury-shopping by litigants, permitting them to decide whether to take their chances on resubmitting the verdict and findings to the jury sitting or remain silent thereby allowing the entry of judgment and moving for a new trial before a new jury . . . .
>
> . . . [t]he rule that objection on the ground of inconsistency is waived by failure to move for resubmission promotes the fair and expeditious correction of error. It requires the error be corrected in the proceeding in which it is made, by the jury which made it unless the trial court determines in the exercise of its discretion under Rule 49(b) to enter judgment on the special findings or to order a new trial.
>
> Our interpretation of Rule 49(b) , in the absence of objection by counsel, leaves to the trial court alone the discretion to choose the means of correcting inconsistency, subject to review by this Court on appeal.

393 F.2d at 506, 507. *Accord: Itel Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253 (llth Cir. 1983) (appellants waived objection to alleged inconsistencies in verdict by failure to object at the time the verdict was rendered); *Fernandez v. Chardon*, 681 F.2d 42 (lst Cir. 1982), *affirmed*, 462 U.S. 650 (1983) (counsel waited until after the jury was excused before raising the inconsistency claim; defendants therefore held to have waived their right to have the general verdict set aside on this ground); *Rowe International, Inc. v. J-B Enterprises, Inc.*, 647 F.2d 830 (8th Cir. 1981) (trial court did not err in returning jury to correct a mistake in the verdict before accepting the verdict and discharging the jury on basis of inconsistent verdict); *Skillin v. Kimball*, 643 F.2d 19 (lst Cir. 1981) (party cannot implant ground for appeal by failure to object to jury verdict under Rule 49 before jury is dis-

charged); *Ludwig v. Marion Laboratories, Inc.*, 465 F.2d 114 (8th Cir. 1972); *Barnes v. Brown*, 430 F.2d 578 (7th Cir. 1970) (failure of appellant to move to resubmit verdicts to jury for reconciliation and permitting judge to discharge the jury with inconsistent verdict standing constituted waiver of any objection to the inconsistency of verdict); *Tennessee Consolidated Coal Co. v. United Mine Workers*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970). In *Bass v. Dehner*, 103 F.2d 28 (10th Cir.), *cert. denied*, 308 U.S. 580 (1939) we held that before declaring a conflict between special findings and a general verdict, an effort should be made to reconcile any apparent inconsistency.

With respect to answers inconsistent with the general verdict, it is recognized that the trial court has three courses of action available under Rule 49(b). The court may order the jury to deliberate further, order a new trial, or disregard the general verdict and order judgment on the basis of answers to interrogatories. Wright and Miller, *Federal Practice & Procedure: Civil* § 2513. The first option was clearly available in the instant case. During the first trial, the court specifically invited counsel to carefully examine the jury's verdict before it was announced and entered and to voice any objections thereto prior to discharge of the jury. Diamond Shamrock's counsel did not object to the jury verdict until *after* the jury had been discharged, notwithstanding the trial court's caveat that *any* objections to the jury verdict should be lodged *before* the verdict was formally returned and entered. *Supra*, pp. 7, 8. We hold that failure on the part of Diamond Shamrock's counsel to object to the jury verdict on the alleged ground of inconsistency constituted a waiver of such contention on appeal. Diamond Shamrock's failure to so object was, apparently, a measured, calculated trial tactic.

We are aware that the trial court could have, *sua sponte*, granted Diamond Shamrock a new trial pursuant to Rule 50(b). *Kain v. Winslow Mfg., Inc.*, 736 F.2d 606 (10th Cir.

1984), *cert. denied*, ___ U.S. ___ (1985). Such action is required if a verdict reflects inconsistencies on its face indicating either that the jury was in a state of confusion or abused its power. Under such circumstances, not present here, a new trial must be granted. *Global Van Lines, Inc. v. Nebeker*, 541 F.2d 865 (10th Cir. 1978); *Hopkins v. Coen*, 431 F.2d 1055 (6th Cir. 1970); *Cheney v. Moler*, 285 F.2d 116 (10th Cir. 1960) (verdict returned with "no damages" even though plaintiff lost ear as result of fight with defendant was nullity under the circumstances requiring retrial on all issues notwithstanding failure of plaintiff to object to the verdict). Unlike the determination in *Cheney*, the instant case is a proper case to invoke the harsh impact of the waiver rule.

In our view the trial court erred in setting aside the verdict of the jury returned at the first trial. The general verdict was not objected to prior to the jury's discharge. Contrary to Diamond Shamrock's contention, the verdict is not inconsistent on its face. The claimed inconsistency rests upon the jury's finding for Diamond Shamrock on its breach of contract claim against Zinke and Trumbo (balance owing for drilling and completion costs) and the express finding of negligence against Diamond Shamrock in the operation of the well in favor of Zinke and Trumbo and the royalty owners, Hamilton, Francis and Richardson. A verdict which resolves separate and distinct causes of action in favor of both parties to a lawsuit is not inconsistent on its face. We hold that a party's failure to object to a verdict on the ground of inconsistency prior to the jury's discharge waives his right to raise the issue in a posttrial motion or on appeal unless the verdict is inconsistent on its face so that entry of judgment upon the verdict is plain error. We therefore hold that the trial court erred in setting aside the jury's verdict upon a ground waived by Diamond Shamrock.

The trial court also erred in finding that the jury' s verdict was inconsistent in fact. The claim of inconsistency

advanced by Diamond Shamrock, adopted by the trial court, was that the jury, by finding for Diamond Shamrock on its *contract* claim impliedly found that Diamond Shamrock, as the operator under the Joint Operating Agreement, had performed the drilling and completion work in a good and workmanlike manner and, accordingly, could not have been liable on the *tort* claims advanced against it. Diamond Shamrock contended as follows:

> The verdicts entered by the jury are inconsistent on their faces and indicate that.the jury was either in a state of confusion or that the jury abused its power. Specifically, it is impossible for the jury to find that DIAMOND SHAMROCK performed conditions in a good and workmanlike manner and at the same time find that DIAMOND SHAMROCK had been negligent and grossly negligent. The verdict awarding DIAMOND SHAMROCK $212,805.60 under the Joint Operating Agreement is irreconcilably inconsistent with the verdict awarding ZINKE & TRUMBO, LTD. $995,196.00 for gross negligence or willful misconduct and verdict awarding John Hamilton, Martha Francis and Morris Richardson, $971,179.00 for negligence.

(R., Vol. II, pp. 274-75.)

The defect in this argument is that Diamond Shamrock's claim of inconsistency rests upon its contention that the jury, by its finding for Diamond Shamrock on its contract claim, impliedly found that Diamond Shamrock had performed its drilling and completion operations on Hamilton No. 1-33 well in a good and workmanlike manner. Such is not the case. Diamond Shamrock's theory of the case was that under the terms of the Joint Operating Agreement non-operators were unconditionally obligated to pay their proportionate share of the costs of drilling and completion. This was clearly evidenced by Diamond Shamrock's

cross-examination of Mr. Robert M. Zinke, who, after stating that Zinke and Trumbo were obligated under the Joint Operating Agreement to pay their share of the costs of work done by Diamond Shamrock in a "good workmanlike manner" without "gross negligence or wilful misconduct" was asked:

> Q. And does the operating agreement provide that if the work is not in a workmanlike manner or gross negligence occurs, that you're not obligated to pay?
>
> A. I'm not Marvin Wiggly. I'm not an expert on operating agreements. I don't know. Possibly it does. I don't know.
>
> Q. Well, let's look at it then. Now, on Page 1 of the accounting procedure, you're required to pay your invoices within fifteen days. If you have any questions, you can audit the account; isn't that right?
>
> A. Yes, sir, that's correct.
>
> Q. So payment is not excused because you decide on your own that the operator's been negligent.
>
> A. That's true.

(R., Vol. VII, pp. 322-23.) And during closing argument, counsel for Diamond Shamrock argued that the terms of the Joint Operating Agreement Diamond Shamrock, as operator, had sole decision making authority in the drilling of the well and that Zinke and Trumbo's claim that Diamond Shamrock was negligent was not "an element of Diamond Shamrock's proof" and that Diamond Shamrock was obligated only to "show you that they complied with the contract." (R., Vol. X, pp. 8-11.)

The trial court accepted Diamond Shamrock's contention that if it had substantially complied with the Joint Oper-

ating Agreement as operator, Diamond Shamrock was contractually entitled to recover for the work done in the drilling of the well. The jury was so instructed. (R., Vol. II, pp. 430-31.) The court clearly instructed separately, without objection, on Diamond Shamrock's breach of contract claim and the counterclaims for gross negligence and negligence, and the general verdict contained findings on each. Thus, although each claim arose out of Diamond Shamrock's operation of the well, the parties, under their respective theories of the case, elected to permit the jury to treat the breach of contract claim of Diamond Shamrock against Zinke and Trumbo separate and distinct from the counterclaims. (See jury instructions 4, 5, 6, 7, 8 and 9, Vol. II, pp. 430-39.)

Thus, we conclude that there were no inconsistencies in fact in the jury's general verdict. The jury, as instructed, returned an award of damages for Diamond Shamrock and against Zinke & Trumbo on its breach of contract claim under the Joint Operating Agreement. By doing so, the jury adopted Diamond Shamrock' s theory of the case on this claim, i.e., that as operator it was entitled to receive payment from Zinke and Trumbo for all costs and expenses not challenged under the audit provision of the Joint Operating Agreement. By the same token, the jury, in accord with the court' s instructions, found for the defendant and counterclaimants on their claim of negligent and gross negligent operations of Diamond Shamrock and Diamond Shamrock's breach of implied covenant to protect against drainage and to market.

In effect, then, the jury's verdict "tracked" the theory-of-the-case exactly as Diamond Shamrock invited it to be considered by the jury. The record, largely due to Diamond Shamrock's direct and cross-examination, reflects that the contractual obligation of Zinke and Trumbo to Diamond Shamrock for proportionate share of drilling and completion costs was treated and considered by the jury independent of the negligence claims and the failure to market

and to prevent drainage claims. With regard to the latter, a cause of action for breach of an implied covenant to prevent drainage does not require proof of negligent operations. *Spaeth v. Union Oil Co. of California*, 710 F.2d 1455 (lOth Cir. 1983); *Dixon v. Anadarko Production Company*, 505 P.2d 1394 (Okl. 1972).

Thus, the claimed inconsistency is between verdicts resolving entirely separate and distinct causes of action. The verdicts on the counterclaims were not required to be consistent with the verdict on Diamond Shamrock's breach of contract claim because the parties and the court submitted the respective claims to the jury for separate, distinct consideration. Thus, there was no inconsistency on the face of the general verdict. The verdicts are not repugnant or in irreconcilable conflict. This trial involved separate causes of action and the relationship of the parties was not legally identical with regard to each cause of action.

Where several distinct causes of action, such as here, are tried together, verdicts awarding recovery to some of the parties on one theory or cause of action and to other parties on another theory or cause of action are not necessarily inconsistent. In those cases where the several causes of action are identical and defended on the same ground, a verdict for the plaintiff on one cause of action and for the defendant on another is inconsistent. Further, if two causes of action are of such a nature that recovery can be had only as to one, verdicts in favor of a plaintiff and against the defendants on both causes of action are inconsistent.

Notwithstanding the consistency among the parts of the verdict, we hold, in accord with *Stancil v. McKenzie Tank Lines, Inc., supra*, and the mandates of Rule 49(b) , that under the facts and circumstances of this case, Diamond Shamrock's failure to object to the jury's general verdict with findings returned at the first trial prior to the jury's

discharge constituted a waiver of any alleged inconsistencies in the damages awarded.

We **REVERSE** and **REMAND** with instruction that the district court reinstate the general verdict of the jury returned at the first trial and enter judgment thereon.

Nos. 85-1698, 85-1803 - DIAMOND SHAMROCK CORPORATION v. ZINKE & TRUMBO, LTD., et al.

McKAY, Circuit Judge, concurring in part and dissenting in part:

I concur in the result reached by the majority and in the court's conclusion that it is possible to reconcile the apparent inconsistencies in the verdicts returned at the first trial. I have serious misgivings, however, about the majority's reliance on Rule 49(b) of the Federal Rules of Civil Procedure. In my view, Rule 49 does not apply in this case. I therefore dissent from the court's holding that Diamond Shamrock waived its right to object to inconsistencies in the verdicts by failing to object or move for resubmission before the jury was dismissed.

The facts which gave rise to this action are set out in the majority's opinion and to repeat them here would extend this opinion to unwarranted length. I think it is necessary, however, to set out in the margin the verdict form that was submitted to the jury in the first trial.[1]

---

[1]

Verdict

[Place either "plaintiff", "defendants", or "counterclaimants" in the first blank.]

We, the Jury, find as follows:

1. for the Plaintiff upon the claim by the plaintiff, Diamond Shamrock Corporation, for breach of the operating agreement and fix damages in the amount of $212,805.60;

2. for the Plaintiff upon the claim by the defendant, Zinke & Trumbo, Ltd., for breach of a new agreement and fix damages in the amount of $0.00;

3. for the Defendant upon the claim by the defendant, Zinke & Trumbo, Ltd., for gross negligence and/or willful misconduct in the operation of the well and fix damages in the amount of

Throughout the majority opinion, the court refers to the jury's verdict in the first trial as a "general verdict." Although nothing in the court's opinion suggests that this "general verdict" was accompanied by responses to "written interrogatories," the court relies on Rule 49(b) of the Federal Rules of Civil Procedure to reach the conclusion that "the instant case is a proper case to invoke the harsh impact of the waiver rule." Majority Opinion at 17. What the majority fails to recognize is that Rule 49(b) governs only when the jury returns a general verdict accompanied by responses to "written interrogatories upon one or more issues of fact." Where, as here, the jury returns general verdicts on separate claims and counterclaims and makes no written findings on issues of fact, Rule 49(b) does not apply.

Rule 49[2] grants the trial court the discretion to use one of two different procedures as an alternative to submitting

---

$995,196.00;

4. for the Counterclaimants upon the claim by the counterclaimants, John Hamilton, Martha Frances and Morris Richardson, for negligence in the operation of the well and fix damages in the amount of $971,179.00;

5. for the Plaintiff upon the claim by the counterclaimants, John Hamilton and Martha Frances, for breach of the implied covenant to market and fix damages in the amount of $0.00; and

6. for the Counterclaimants upon the claim by the counterclaimants, John Hamilton and Martha Frances for breach of the implied covenant to protect against drainage, and fix actual damages in the amount of $32,499.00 and punitive damages in the amount of $1,000,000.00 (one million dollars).

Nov. 2. 1983 [signed
Date Foreman

[2] **Rule 49. Special Verdicts and Interrogatories**

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written

a civil case to the jury for a general verdict. In his oft-cited article on the use of special verdicts in federal court, former Chief Judge John R. Brown of the Fifth Circuit has observed: "The distinction between F.R.Civ.P. 49(a) and 49(b) must be—but sometimes is not—made. . . . Neither Courts nor Judges are immune." Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 339 & n.5 (1967) (footnotes omitted) . The majority's opinion

---

questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

demonstrates that the same can be said for the distinction between separate general verdicts and the alternative verdicts that are authorized by Rule 49.

In order to understand why I think Rule 49 does not apply in the instant case, it is necessary to understand when the Rule does apply. Rule 49(a) , entitled "Special Verdicts," allows the court "to dispense with the general verdict altogether, and to submit the various fact issues in the case to the jury in the form of individual fact questions, on each of which the jury is to return a special verdict." 9 C. Wright and A. Miller, *Federal Practice and Procedure* § 2501, at 485 (1971). Judge Brown, who has been described as "the strongest advocate of Rule 49(a) on the bench," *id.* at § 2505, at 495, explains the distinction between Rule 49(a) and Rule 49(b):

> Rule 49(b) offers, so far as I can see, nothing but trouble because it seeks to meld a general verdict and special answers with the high likelihood of conflict which extinguishes both. Rule 49(a), on the other hand, if used with skill and resourcefulness, melds the general *charge* (not verdict) with the special answers to specific controlling issues of fact or legal-fact. My approach recognizes that in an appropriate form and way the Judge gives a firm, detailed explanation of controlling principles specifically related to the case, almost as he would for a general verdict. The difference is that under the 49(a) technique the jury, applying these instructions, records its conclusions with precision, not in the conglomerate ambiguity of "for the plaintiff," "for the defendant," or the like.

Brown, 44 F.R.D. at 339-40 (footnote omitted).

Rule 49(a) speaks in terms of a "special verdict in the form of a special written finding upon each issue of fact." Thus, "[t]he rule contemplates that only factual questions

will be submitted to the jury to which the judge will then apply the law, supplementing, if necessary, any factual determinations not submitted to the jury." *Quaker City Gear Works, Inc. v. Skil Corp.*, 747 F.2d 1446, 1453 (Fed. Cir. 1984), *cert. denied*, 105 S. Ct. 2676 (1985) (citing 5A *Moore's Federal Practice*, ¶ 49.02, at 49-8 (2d ed. 1984).[3] Similarly, Rule 49(b) , entitled "General Verdict Accompanied by Answer to Interrogatories," permits the trial court to request the jury to return a general verdict accompanied by responses to "written interrogatories upon one or more issues of fact."

My objection to the majority's application of Rule 49 in this case is that the verdict returned by the jury in the first trial did not resolve specific issues of fact or even mixed questions of law and fact. Rather, the jury merely found "for the plaintiff," "for the defendant," or "for the counterclaimants" on six separate claims and counterclaims. Thus, the verdict in this case does not fit comfortably within the framework of either Rule 49(a) or Rule 49(b). Rule 49(a) is ruled out for two reasons: (1) the jury did not make written findings of fact; and (2) the jury's findings "for the plaintiff," "for the defendant," or "for the counterclaimants" on each claim and counterclaim can only be described as a general verdict. *See* Brown, 44 F.R.D. at 340. And, although Rule 49(b) refers to a "general verdict," that subdivision cannot apply either because the jury did not respond to "written interrogatories upon one or more issues of fact."

---

[3] Under a precise reading of Rule 49(a), a "special verdict" seeks resolution of only *factual* issues. Some courts, however, have approved the use of Rule 49 (a) to resolve mixed questions of law and fact. *Quaker City Gear Works*, 747 F.2d at 1453. *See also Landy v. Federal Aviation Administration*, 635 F.2d 143, 147 (2d Cir. 1980), *aff'd.*, 705 F.2d 624, *cert. denied*, 104 S. Ct. 243 (1983); *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 715 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

Other courts have declined to apply Rule 49 where the jury's verdict did not resolve specific "issues of fact." For example, in *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506 (Fed. Cir.), *cert. denied*, 105 S. Ct. 220 (1984), the court said:

> The challenged "interrogatory" is inartfully labeled as such by the parties. It sets forth a standard of proof ("proved by clear and convincing evidence") in relation to a legal conclusion ("invalid on the ground of obviousness"). Yet legal conclusions are not proved; facts are. Interrogatories, as such, are best employed in seeking answers to factual questions, the answers to which lead to or require a legal conclusion.
>
> . . . .
>
> Though labeled as "interrogatories", the ten questions put to the jury were designed to elicit, and were treated by all concerned as having elicited , a ten-part verdict. . . . The jury's responses were not special verdicts, because they were not simply "written finding[s] upon each issue of fact". Rule 49(a), Fed. R. Civ. P. Nor was there a single general verdict, *per se*, accompanied by "written answers" to "one or more issues of fact, the decision of which is necessary to a verdict". Rule 49(b) Fed. R.Civ. P. Nonetheless, as above indicated , the parties have correctly viewed the jury's ten responses as the equal of a general verdict for Stucki.

Id. at 1515-16. Similarly, in *Merchant v. Ruhle*, 740 F.2d 86 (lst Cir. 1984) , in considering an alleged inconsistency in two verdicts, the court said:

> [W]e first must determine whether we are dealing with two general verdicts or a general verdict and answers to interrogatories under Fed. R. Civ.

> P. Rule 49(b). If the latter applies, we must scrutinize the negligence and seaworthiness findings for irreconcilable inconsistency. If we are dealing with general verdicts, we do not have the compulsion of a procedural rule to determine such inconsistency.
>
> . . . .
>
> We would be reluctant to interpret Rule 49(b) as applicable. First, there is no "general verdict" even if the jury's response qualify [sic] as answers to "interrogatories upon one or more issues of fact". Second, the first and second questions and answers are in such comprehensive and conclusory terms as to constitute essentially general verdicts on the two counts of the complaint in all respects but damages.

Id. at 88-89 (footnotes and citations omitted). *See also Cunningham v. M-G Transport Services, Inc.*, 527 F.2d 760 (4th Cir. 1975) (per curiam) (instructing district courts to put special interrogatories in the form of questions rather than affirmative statements). In *Miller v. Premier Corp.*, 608 F.2d 973 (4th Cir. 1979), the trial court instructed the jury to return one of four alternative verdict forms. The Fourth Circuit explained the procedure as follows:

> In an effort to aid the jury in its resolution of the many issues presented in this multi-claim, multi-party action, the district court decided to give the jury a choice of four alternative general verdict forms to return. Only one was to be returned and the court's instructions were designed to present the issues in a way related to the different verdicts so that the one proper choice could be dictated by the jury's resolution of the issues. One verdict was to be returned if the jury found for the plaintiffs on the securities fraud claims. Another was to be returned if the jury

> found for the plaintiffs against Premier on the common law fraud claim. A third was to be returned if the jury found for the defendant Premier on its counterclaim. The fourth was to be returned if the jury found against plaintiffs on all their claims, and against defendant Premier on its counterclaim. (a general "for the defendant" verdict).

Id. at 982-83 (footnote omitted) . The court in *Miller* noted that this procedure "was not the special verdict submission authorized by Fed. R. Civ. P. 49(a) , but a general verdict submission in which various discrete general verdict choices were given as alternatives." *Id.* at 982 n.l0.

Though I am convinced that these cases correctly drew the distinction between separate general verdicts and verdicts governed by Rule 49, Judge Brown's opinion in *Mercer v. Long Manufacturing N.C., Inc.*, 665 F.2d 61 (5th Cir.), *reh'g denied*, 671 F.2d 946 (1982) (per curiam), suggests that the distinction is not as clear as one might think. In *Mercer*, the jury was instructed to find for the plaintiff or the defendant on three separate theories of liability: breach of warranty, deceptive trade practices, and strict liability. The jury found for the plaintiff on two theories of liability and assessed damages against the defendant. On appeal, the plaintiff asserted that the verdict was not governed by Rule 49(a) because it was not a special verdict, but rather three separate general verdicts, one for each of three separate theories of liability. In his opinion for the court, Judge Brown rejected this argument, describing the submission to the jury as a "special verdict consisting of four interrogatories under F. R. Civ. P. 49(a) ." *Mercer*, 665 F.2d at 64 (footnote omitted). Judge Brown explained:

> Although the interrogatories included three bases for liability, we find that the submission was pursuant to Fed. R. Civ. P. 49(a). No general verdict

> was rendered by the jury, and the District Court entered judgment only after applying the treble damage provisions of the DTPA, both factors pointing against finding a submission under F. R. Civ. P. 49(b).

Mercer, 665 F.2d at 65. Although Judge Brown may well be the leading scholar on the use of special verdicts in federal court, his application of Rule 49(a) in *Mercer* appears to be inconsistent with his description of Rule 49(a) as a technique whereby the jury, applying the court's instructions, " records its conclusions with precision, not in the conglomerate ambiguity of 'for the plaintiff,' 'for the defendant,' or the like." Brown, 44 F.R.D. at 340. Although *Mercer* is distinguishable from the instant case,[4] I must concede that Judge Brown's opinion in *Mercer* supports the majority's application of Rule 49. But even if I am wrong in believing that Rule 49 should not apply here, *Mercer* makes clear that the majority is also wrong in analyzing this case under Rule 49(b) instead of Rule 49(a). Here, the jury did not return a single general verdict but instead returned separate verdicts on each claim or counterclaim.

The distinction between Rule 49(a) and Rule 49(b) is important in this case because of the majority's adoption of a "waiver rule" where counsel fails to raise the issue of inconsistent verdicts before the jury is discharged. I would not hesitate to apply a "waiver rule" in a case governed by Rule 49(b).[5] The cases cited by the majority

---

[4] In *Mercer*, the jury was asked to return separate verdicts on different theories of liability and to assess the total damages, if any, for the plaintiff. Here, in contrast, the jury was asked to return separate verdicts on each claim and counterclaim and to assess damages with respect to each.

[5] This is not to say, however, that I would join the majority in holding that, because Diamond Shamrock waived its objection to inconsistencies in the verdicts, the trial court does not have the discretion under Rule

provide ample support for such a rule. But I am not aware of any case where the "waiver rule" has been applied in the context of Rule 49(a).[6] Indeed, the Fifth Circuit . con-

---

59 of the Federal Rules of Civil Procedure to order a new trial on that same ground. In every case cited in the majority opinion, the "waiver rule" was invoked by the appellate court to affirm the trial court's denial of a motion for new trial. I am not aware of any case where the "waiver rule" has been applied to reverse the trial court's grant of a new trial on the grounds of inconsistent verdicts. The majority's application of the "waiver rule" in this context impinges on the trial court's broad discretion under Rule 59(d) to grant a new trial *sua sponte*. In commenting on the breadth of the trial court's discretion, this court has explained:

> Rule 59 F.R.Civ.P., 28 U.S.C.A., provides that a new trial may be granted in jury trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." The rule makers did not attempt to delineate all of the reasons, but obviously had reference to grounds for granting new trial as at common law. Indeed, the Seventh Amendment to the Constitution provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." And, Professor Moore says that the Seventh Amendment is the only present limitation upon the reexamination of facts found by a jury. See Moore's Federal Practice, Vol. 6, p. 3733, § 59.05(2). Long before the adoption of the Seventh Amendment, common law courts were granting motions for new trial upon any grounds which, in the sound judgment of the trial court, were in the interest of the proper administration of justice. Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 122 F.2d 350. . . .
>
> . . . [T]he granting of a new trial involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all the reasons which inhere in the integrity of the jury system itself. Felton v. Spiro, 6 Cir., 78 F. 576; Aetna Cas. & Surety Co., v. Yeatts, supra.

Tidewater Oil Co. v. Waller, 302 F.2d 638, 642-43 (10th Cir. 1962).

[6] The First Circuit applied the "waiver rule" in Skillin v. Kimball, 643 F.2d 19, 19-20 (1st Cir. 1981) . It is not clear from the court's opinion whether the submission in that case was pursuant to Rule 49(a) or Rule 49(b) . However, the cases cited by the court involved submission under Rule 49(b). Other courts have interpreted *Skillin* as a

sidered this issue on petition for rehearing in *Mercer*, and concluded that, in cases involving submission pursuant to Rule 49(a) . objections to inconsistencies in the verdicts are *not* waived by failure to present them before the jury is discharged. *Mercer*, 671 F.2d 946, 947-48 (5th Cir. 1982) (per curiam on petition for reh'g). The court explained:

> Rule 49(b) specifically states that when the "answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." There is no such specific direction encompassed within Rule 49(a).

Id. at 948 n.l. *See also Ladnier v. Murray*, 769 F.2d 195, 198 n.5 (4th Cir. 1985); *Alverez v. J. Ray McDermott & Co., Inc.*, 674 F.2d 1037, 1040-41 (5th Cir. 1982) . Though I would have considerable difficulty in applying Rule 49 to this case, I am persuaded by *Mercer* that if this case can be made to fit within the framework of Rule 49, it must be under subdivision (a) rather than subdivision (b). Accordingly, I would not hold, as does the majority, that by failing to move for resubmission to the jury on the

---

Rule 49(a) case but have declined to follow it. *See* Ladnier v. Murray, 769 F.2d 195, 198 n.5 (4th Cir. 1985) (refusing to follow *Skillin*); Bates v. Jean, 745 F.2d 1146, 1150 (7th Cir. 1984) (not reaching the question whether the "waiver rule" applies to Rule 49(a)); Mercer v. Long Mfg. NC., Inc., 671 F.2d 946, 948 n.l (5th Cir. 1982) (per curiam on petition for reh'g) (refusing to follow *Skillin*).

Our decision in Bell v. Mickelsen, 710 F.2d 611 (l0th Cir. 1983), is not to the contrary. Although we cited *Skillin* with approval in that case, we did not characterize *Skillin* as a Rule 49(a) case. *Id.* at 616. Moreover, we did not decide in *Bell* whether counsel's failure to object to inconsistencies in the special verdicts precluded appellant from raising that issue on appeal. We held only that ambiguities in the jury instructions and the special verdict questions were waived by counsel's failure to object at trial. *Id.* at 616.

basis of inconsistencies in the verdicts, Diamond Shamrock has waived that issue on appeal.

I fully concur, however, with the majority's view that it is possible to reconcile the apparent inconsistencies in the verdicts. "In reviewing a verdict for inconsistency, a court has a duty under the seventh amendment to reconcile the answers and uphold the verdict if that is at all possible." *Crossland v. Canteen Corp.*, 711 F.2d 714, 725 (5th Cir. 1983); *see also Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 364 (1962); *Burger King Corp. v. Mason*, 710 F.2d 1480, 1489 (llth Cir. 1983); *Mercer v. Long Manufacturing, N.C., Inc.*, 665 F.2d 61, 65-66 (5th Cir.), *reh'g denied*, 671 F.2d 946 (5th Cir. 1982). "[I]f there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly." *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973).

Not only the trial court, but this court as well, has a constitutional duty to reconcile apparent inconsistencies in the jury's verdicts, if at all possible, before we are free to disregard those verdicts and affirm the trial court's grant of a new trial. *Gallick v. B & 0 Railroad Co.*, 372 U.S. 108, 119 (1963); *Gross v. Black and Decker, Inc.*, 695 F.2d 858, 867 (5th Cir. 1983) . Although the jury's verdicts could easily be construed as inconsistent, "a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 364 (1962) . Because the trial court could have harmonized the apparently conflicting findings of the jury but failed to do so, I would hold that the trial court abused its discretion when it set aside the jury verdict and ordered a new trial.

Although I disagree with the rationale adopted by the majority for its holding, I fully concur in the court's judg-

ment reinstating the jury verdict returned at the first trial and entering judgment thereon.

Nos. 85-1698, 85-1803—Diamond Shamrock Corporation v. Zinke and Trumbo.

TACHA, Circuit Judge, concurring.

I concur only in the portion of the court's opinion that finds that the verdicts in the first trial were not inconsistent and therefore should be reinstated. I think it is unnecessary to reach the Rule 49 question and therefore decline to express an opinion on that issue.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-82-1754-E

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Plaintiff,

vs.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual,

Defendants,

and

MORRIS A. RICHARDSON, JOHN HAMILTON, and MARTHA FRANCIS,

Counterclaimants.

[FILED April 18, 1985]

CERTIFIED INTERLOCUTORY ORDER

On this 28th day of March, 1985, Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict came on for hearing before the Court, all parties being represented by their attorneys of record herein, and the parties having presented their authorities and arguments and based upon the record in this case, the Court hereby finds as follows:

1. That Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict should be denied.

2. That on February 11, 1985, the above cause and all counterclaims permitted by the Court to be heard by the jury came on for trial before the Court and jury and that, on February 19, 1985, the jury returned its verdict. By its Journal Entry of Judgment, the Court has rendered judgment in favor of Plaintiff and against Defendants in the amount of $220,830.34 and further against Defendants on their counterclaims of gross negligence, breach of oral contract and kickbacks including punitive damages, and against Counterclaimants on their claim of negligence.

3. The Court's oral instructions to the jury, explaining the verdict forms, may be erroneous and the jury failed to return a verdict either for or against Counterclaimants JOHN HAMILTON and MARTHA FRANCIS on their counterclaims for breaches of the implied covenants to protect against drainage and to market.

4. The Court finds, on its own Motion and pursuant to its letter to counsel for all parties in this case dated February 20, 1985, which is on file in this case, that a new trial should be granted on Counterclaimants JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breach of the implied covenant to market and to protect against drainage.

5. Two jury trials have been held in this case, the Court having previously granted Plaintiff's Motion for New Trial filed after the first jury trial by its Order entered on January 11, 1984.

6. The denial of Plaintiffs' Motion for Judgment in Accordance with Motion for Directed Verdict, the granting of a new trial upon the Court's own Motion and the granting of Plaintiff's Motion for New Trial on January 11, 1984 involve controlling questions of law as to which there are substantial grounds for differences of opinion.

7. An immediate appeal from the rulings specified in Paragraph 6 above may materially advance the ultimate determination of the litigation.

8. An immediate appeal from the rulings herein will prevent protracted and expensive litigation. This matter has been pending for two and one-half years and two lengthy jury trials have been held on these claims, the Court having previously granted a motion for new trial after the first jury trial was held.

9. An immediate appeal will expedite the ultimate termination of this litigation and thereby save unnecessary expense and delay.

10. This Court has directed the entry of final judgment with respect to all other claims in this action, with the exception of JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breach of the implied covenant to market and to protect against drainage. This Court has certified such judgment for immediate appeal pursuant to Rule 54, Fed. R. Civ. P. Thus piecemeal appeals will be avoided by certification of the controlling questions of law involved in these interlocutory orders because all issues can be appealed at the same time.

11. An immediate appeal may avoid a third jury trial on the claims for failure to market and protect against drainage because the incorrect disposition of the controlling questions of law raised by the rulings herein would require reversal of the orders granting a new trial and/or the order denying Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and the reversal of any judgment rendered on a jury verdict after third new trial.

12. An immediate appeal would more efficiently dispose of this litigation under the circumstances of this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff DIAMOND SHAMROCK CORPORATION's Motion for Judgment in Accordance with Motion for Directed Verdict is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a new trial is hereby granted on Counterclaimants JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breaches of the implied covenants to market and to protect against drainage.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the new trial hereby granted is stayed until the Court of Appeals disposes of the interlocutory appeal brought from these rulings or until the time for interlocutory appeal has passed without the parties having filed such an appeal.

CERTIFICATION

I hereby certify that the issues disposed of by this Order denying Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and granting a new trial upon the claims of Counterclaimants JOHN HAMILTON and MARTHA FRANCIS for breaches of the implied covenants to protect against drainage and to market, and by the Order entered on Jaunary 11, 1984 granting Plaintiff's Motion for New trial, involve controlling questions of law as to which there are substantial grounds for differences of opinion and that an immediate appeal from these Orders may materially advance the ultimate termination of this litigation.

Dated this 18 day of April, 1985.

/s/ LUTHER B. EUBANKS
The Honorable Luther B. Eubanks,
Chief Judge United States District
Court, Western District of Oklahoma

Entered In Judgment
Docket 4-18-85

Approved as to form:

/s/ JAMES U. WHITE JR.
James U. White, Jr.
Gary Davis
CROWE & DUNLEVY, P.C.
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
Telephone: (405)235-7700

Attorneys for Defendant and Counterclaimants

/s/ H. B. WATSON, JR.
H.B. Watson, Jr.
Richard K. Books
WATSON & McKENZIE
1900 Liberty Tower
Oklahoma City, Oklahoma 73102
Telephone: (405)232-2501

Attorneys for Plaintiff

SLT/25/sp

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-82-1754-E

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Plaintiff,

vs.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual,

Defendants,

and

MORRIS A. RICHARDSON, JOHN HAMILTON, and MARTHA FRANCIS,

Counterclaimants.

[FILED April 18, 1985]

JOURNAL ENTRY OF JUDGMENT

On February 11, 1985, the above cause and all counterclaims permitted by the Court to be heard by the jury came on for trial before the Court and jury, all parties being represented by their attorneys of record herein, and the parties having presented their evidence and authorities, and arguments to the Court and jury, and having closed all of the evidence on February 15, 1985, the jury, based upon the instructions given by the Court, returned its verdict on February 19, 1985 and made the findings as reflected on the Verdict Form, a true and correct copy of which is attached hereto as Exhibit "A". Based upon the jury's verdict and upon the law,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff DIAMOND SHAMROCK CORPORATION recover on its Complaint from the Defendants the sum of $220,830.34. Based upon the jury's verdict and upon the law,

THE COURT FINDS AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant ZINKE & TRUMBO, LTD. recover nothing on its counterclaim against DIAMOND SHAMROCK CORPORATION for gross negligence and that the Counterclaimants JOHN HAMILTON, MARTHA FRANCIS and MORRIS RICHARDSON recover nothing on their claim for negligence against DIAMOND SHAMROCK CORPORATION.

THE COURT FINDS AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows:

1. DIAMOND SHAMROCK CORPORATION is entitled to judgment, pursuant to this Court's previous rulings including its February 8, 1985 rulings, against ZINKE & TRUMBO, LTD. on ZINKE & TRUMBO, LTD.'s claim for breach of an oral agreement and on ZINKE & TRUMBO, LTD.'s claim for actual and punitive damages for kickbacks.

2. DIAMOND SHAMROCK CORPORATION is further awarded, pursuant to this Court's ruling on April 11, 1985, attorney fees in the amount of $140,000.00 against Defendants and Counterclaimants.

3. Costs will be determined by separate application pursuant to the agreement of the parties.

4. DIAMOND SHAMROCK CORPORATION is entitled to post-judgment interest on the amount awarded by the jury and the amount awarded as attorney fees at the rate of 9.17% per annum from the date hereof.

5. DIAMOND SHAMROCK CORPORATION is allowed all writs and processes provided by law for the enforcement of this judgment.

CERTIFICATION

This Court has found that the jury did not return a verdict on Counterclaimants JOHN HAMILTON and MARTHA FRANCIS' claims for breaches of the implied covenants to market and to protect against drainage. The Court finds that, as to the claims which the Court has entered judgment by its Journal Entry of Judgment, finality should be ordered to advance the interests of sound judicial administration and justice to the litigants, based upon a balancing of competing factors, including the following:

1. The claims upon which the Court has entered judgment by its Journal Entry of Judgment were finally adjudicated and they are separate, distinct and independent from Counterclaimants HAMILTON and FRANCIS' claims for breaches of the implied covenant to market and to protect against drainage.

2. Certification of these claims will not result in unnecessary appellate review nor will the questions raised in such appeal have to be decided more than once in the event of a subsequent appeal because the above claims are separate and unrelated to Counterclaimants HAMILTON and FRANCIS' claims for breaches of the implied covenant to market and to protect against drainage.

3. An immediate review of the claims finally adjudicated would not be mooted by any future developments in this lawsuit.

4. Due to the length of time that this lawsuit has been pending and because two lengthy jury trials have already been held in this case, any further delay in the entry of judgment would be unjust to the parties. Judgment should also be entered so that it will bear interest.

IT IS THEREFORE CERTIFIED that, with respect to the claims finally determined by the jury's verdict and the Journal Entry of Judgment to which this certificate is

appended, in accordance with Rule 54(b), Fed. R. Civ. P., (1) the Court has directed the entry of final judgment for the Plaintiff on its Complaint in the amount of $220,830.34, and against Defendants on their counterclaims for gross negligence, breach of oral contract and kickbacks, including punitive damages, and against all Counterclaimants on their counterclaim for negligence; and (2) the Court has determined there is no just reason for delay.

Dated this 18 day of April, 1985.

/s/ LUTHER B. EUBANKS
The Honorable Luther B. Eubanks,
Chief Judge United States District
Court, Western District of Oklahoma

Entered In Judgment
Docket 4-18-85

Approved as to form:

/s/ JAMES U. WHITE, JR.
James U. White, Jr.
Gary Davis
CROWE & DUNLEVY, P.C.
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
Telephone: (405)235-7700

Attorneys for Defendant and
Counterclaimants

/s/ H.B. WATSON, JR.
H.B. Watson, Jr.
Richard K. Books
WATSON & McKENZIE
1900 Liberty Tower
Oklahoma City, Oklahoma 73102
Telephone: (405)232-2501

Attorneys for Plaintiff

SLT/24/sp

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-82-1754-E

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Plaintiff,

v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and DAVID B. TRUMBO, an individual,

Defendant.

V E R D I C T

[Place either "plaintiff," "defendants," or "counterclaimants" in the first blank.]

We, the Jury, being duly empaneled and sworn upon our oath, find as follows:

1. for the plaintiff upon the claim by the plaintiff, Diamond Shamrock Corporation, for breach of the operating agreement and fix damages in the amount of $220,830.34;

2. for the _____upon the claim by the defendant, Zinke & Trumbo, Ltd., for gross negligence and/or willful misconduct in the operation of the well and fix actual damages in the amount of $ _____ ; and punitive damages, if any, in the amount of $ _____ .

3. for the _____upon the claim by the counterclaimants, Morris A. Richardson, John Hamilton, and Martha Francis, for negligence in the operation of the well and fix damages in the amount of $ _____ ; and punitive damages, if any, in the amount of $ _____ ;

EXHIBIT A-PAGE 1 OF 2 PAGES

4. for the _____upon the claim by the counter-claimants, John Hamilton and Martha Francis for breach of the implied covenant to protect against drainage, and fix actual damages in the amount of $ _____ ; and punitive damages, if any, in the amount of $ _____ .

5. for the _____upon the claim by the counter-claimants, John Hamilton and Martha Francis, for breach of the implied covenant to market and fix actual damages in the amount of $ _____ ; and punitive damages, if any, in the amount of $ _____ .

2-29-85 — LOUIS MCCLURE

Date — Foreman

EXHIBIT A-PAGE 2 OF 2 PAGES

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-82-1754-E

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Plaintiff,

v.

ZINKE & TRUMBO, LTD, a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual.

Defendants.

[FILED January 11, 1984]

ORDER GRANTING NEW TRIAL AND VACATING JUDGMENT

NOW on this 5th day of January, 1984, came on for hearing the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, New Trial filed herein by DIAMOND SHAMROCK CORPORATION, with the Plaintiff DIAMOND SHAMROCK CORPORATION appearing by and through its attorneys H. B. Watson, Jr. and Richard K. Books, and the Defendants ROBERT M. ZINKE and DAVID B. TRUMBO appearing personnally and through their counsel Gary Davis and James U. White, and the Defendant ZINKE & TRUMBO, LTD. and the Counterclaimants Hamilton, Richardson and Francis appearing by and through the same counsel.

The Court, after hearing the authorities presented in the argument of counsel, finds that the Motion for Judgment Notwithstanding the Verdict should be denied and that the Motion for New Trial should be granted in all respects.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the verdict entered in this case on November 2, 1983, should be and is hereby vacated, set aside and held for naught.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment entered herein on November 10, 1983, should be and is hereby vacated, set aside and held for naught.

Dated this 11 day of January, 1984.

BY: /s/ LUTHER E. EUBANKS
Honoraole Luther E. Eubanks

ENTERED IN JUDGMENT DOCKET ON 1-11-84
APPROVED AS TO FORM:

BY: /s/ H.B. WATSON, JR.
H.B. Watson, Jr.
Richard K. Books
Watson & McKenzie
1900 Liberty Tower
Oklahoma City, OK 73102
405/232-2501

BY: _____
Mr. Gary Davis
Mr. James U. White, Jr.
Crowe & Dunlevy
1800 Mid-America Tower
Twenty Broadway
Oklahoma City, OK 73102
405/235-7700

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-82-1754-E

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Plaintiff,

v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and DAVID B. TRUMBO, an individual,

Defendants.

[FILED November 16, 1983]

JOURNAL ENTRY OF JUDGMENT

On October 27, 1983, the above cause and all counterclaims therein, came on for trial before the Court and Jury, all parties being represented by their attorneys of record herein, and the parties having presented their evidence and authorities, and arguments to the Court and Jury, and having closed all of the evidence on October 31, 1983, the Jury made its Verdict based upon the instructions given by the Court, finding for the plaintiff on its complaint, and for the counterclaimants on their counterclaims in the respective amounts indicated in the Jury's Verdict dated November 2, 1983. Based upon the Jury's Verdict and upon the law,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff, Diamond Chemicals Company, recover on its complaint from the defendants the sum of $212,805.60.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that counterclaimant Zinke & Trumbo, Ltd., recover on its counterclaim the sum of $995,196.00 from Diamond Chemicals Company and that counterclaimants John Hamilton, Martha Frances and Morris Richardson jointly recover on their counterclaims the sum of $971,179.00 from Diamond Chemicals Company and that counterclaimants John Hamilton and Martha Frances jointly recover on their counterclaims the sum of $1,032,499.00 from Diamond Chemicals Company:

Based upon the Jury's Verdict and upon the law,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows:

(1) That defendants breached the parties' written joint operating agreement by their failure to pay their proportionate share of completion costs, for which Diamond Chemicals Company is entitled to recover on its complaint the damages awarded by the jury as above-indicated.

(2) That Diamond Chemicals Company performed operations on the Hamilton Well in a grossly negligent manner, for which counterclaimant Zinke & Trumbo, Ltd., is entitled to recover on its counterclaim the damages awarded by the jury as above-indicated.

(3) That Diamond Chemicals Company performed operations on the Hamilton Well in a negligent manner, for which counterclaimants John Hamilton, Martha Frances and Morris Richardson, are entitled to jointly recover on their counterclaims the damages awarded by the jury as above-indicated.

(4) That Diamond Chemicals Company breached its duty to counterclaimants John Hamilton and Martha Frances to protect against drainage as implied under the parties' respective leases, for which counterclaimants John Hamilton and Martha Frances are jointly entitled to actual damages as awarded by the jury in the amount of $32,499.00. Because of the nature of plaintiff's breach of this implied

duty to protect against drainage, counterclaimants John Hamilton and Martha Frances are further entitled to jointly recover punitive damages as awarded by the jury in the amount of $1,000,000.00.

(5) All parties are entitled to post-judgment interest on their respective recoveries as awarded by the jury at the rate of nine and eighty-six one hundredths percent (9.86%) per annum from the date hereof.

(6) The awarding of attorney's fees and costs shall be determined by separate application of the parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all parties are allowed all writs and processes provided by law for the enforcement of this judgment.

DATED this 16 day of November, 1983.

/s/ LUTHER B. EUBANKS
LUTHER B. EUBANKS
Chief Judge - U.S. District Court
Western District of Oklahoma

ENTERED IN JUDGMENT DOCKET ON 11-16-83

Approved as to form:

/s/ JAMES U. WHITE, JR.
Gary W. Davis
James U. White
CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7700
ATTORNEYS FOR DEFENDANTS
AND COUNTERCLAIMANTS

Approved as to form:

/s/ H. B. WATSON, JR.

H. B. Watson, Jr.
Richard K. Books
WATSON & McKENZIE
1900 Liberty Tower
Oklahoma City, Oklahoma 73102
Telephone: (405) 232-2501

ATTORNEYS FOR PLAINTIFF

APPENDIX F

MAY TERM - July 16, 1986

Before Honorable William J. Holloway, Jr., Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges

---

Nos. 85-1698
85-1803

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,
Plaintiff-Appellant, Cross-Appellee,
vs.

ZINKE & TRUMBO, LTD., a business association, ROBERT M. ZINKE, an individual, and DAVID B. TRUMBO, an individual,
Defendants, Counterclaimants-Appellees,
and

MORRIS A. RICHARDSON, JOHN HAMILTON and MARTHA FRANCIS,
Counterclaimants-Cross Appellants.

[FILED July 16, 1986, U.S. Court of Appeals for the Tenth Circuit]

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought

to be reheard. It is the view of this panel that Oklahoma law does not require demand for payment as a prerequisite to filing a suit for damages.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, an no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

ROBERT L. HOECKER, Clerk

By /s/ PATRICK FISHER
Patrick Fisher
Chief Deputy Clerk

APPENDIX G

MAY TERM - July 21, 1986

Before Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges

---

Nos. 85-1698
85-1803

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,
Plaintiff-Appellant, Cross-Appellee,
vs.

ZINKE & TRUMBO, LTD., a business association, ROBERT M. ZINKE, an individual, and DAVID B. TRUMBO, an individual,
Defendants, Counterclaimants-Appellees,
and

MORRIS A. RICHARDSON, JOHN HAMILTON and MARTHA FRANCIS,
Counterclaimants-Cross Appellants.
[FILED JULY 21, 1986-U.S. Court of Appeals For The 10th Circuit]

The Court in order to correct a clerical error in the issuance of this order on July 16, 1986, hereby reissues it in order to reflect that Judge William J. Holloway, Jr. did not participate in the issuance of this order.

The order reissued nunc pro tunc and is to read as follows:

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. It is the view of this panel that Oklahoma law does not require demand for payment as a prerequisite to filing a suit for damages.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Chief Judge Holloway did not participate in the consideration or disposition of the petition for rehearing and suggestion for rehearing en banc.

ROBERT L. HOECKER, Clerk

By /s/ PATRICK FISHER
Patrick Fisher
Chief Deputy Clerk

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-82-1754-W

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Plaintiff,

v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual,

Defendants.

[FILED November 2, 1983]

V E R D I C T

[Place either "plaintiff", "defendants", or "counterclaimants" in the first blank.]

We, the Jury, find as follows:

1. for the Plaintiff upon the claim by the plaintiff, Diamond Shamrock Corporation, for breach of the operating agreement and fix damages in the amount of $212,805.60;

2. for the Plaintiff upon the claim by the defendant, Zinke & Trumbo, Ltd., for breach of a new agreement and fix damages in the amount of $0.00;

3. for the Defendant upon the claim by the defendant, Zinke & Trumbo, Ltd., for gross negligence and/or willful misconduct in the operation of the well and fix damages in the amount of $995,196.00;

4. for the Counterclaimants upon the claim by the counterclaimants, John Hamilton, Martha Frances and Morris Richardson, for negligence in the operation of the well and fix damages in the amount of $971,179.00;

5. for the Plaintiff upon the claim by the counterclaimants, John Hamilton and Martha Frances, for breach of the implied covenant to market and fix damages in the amount of $0.00; and

6. for the Counterclaimants upon the claim by the counterclaimants, John Hamilton and Martha Frances for breach of the implied covenant to protect against drainage, and fix actual damages in the amount of $32,499.00 and punitive damages in the amount of $1,000,000.00 (one million dollars).

November 2, 1983
Date

/s/ LARRY MULLINAX
Foreman

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-82-1754-W

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Plaintiff,

vs.

ZINKE & TRUMBO, LTD, a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual.

Defendants.

[FILED November 14, 1983]

ALTERNATIVE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL

Motion for Judgment Notwithstanding the Verdict

COMES NOW DIAMOND SHAMROCK CORPORATION, Plaintiff herein, and moves this Honorable Court to set aside the verdict rendered in the above-entitled action on November 2, 1983, in favor of Counterclaimants, and to enter judgment in favor of Plaintiff for $212,805.60 on the grounds that:

1. The verdicts entered by the jury are inconsistent on their faces and indicate that the jury was either in a state of confusion or that the jury abused its power. Specifically, it was impossible for the jury to find that DIAMOND SHAMROCK performed operations in a good and workmanlike manner and at the same time find that DIAMOND SHAMROCK had been negligent and grossly negligent.

The verdict awarding DIAMOND SHAMROCK $212,805.60 under the Joint Operating Agreement is irreconcilably inconsistent with the verdict awarding ZINKE & TRUMBO, LTD. $995,196.00 for gross negligence or willful misconduct and the verdict awarding John Hamilton, Martha Francis and Morris Richardson, $971,179.00 for negligence.

2. Judgment should be entered in favor of DIAMOND SHAMROCK on both the prayer for actual damages and the prayer for punitive damages regarding the drainage issue because absolutely *no* evidence was placed before the court or jury to indicate the terms of the oil and gas leases in question, and it is therefore impossible for the jury or the court to determine whether DIAMOND SHAMROCK breached any express or implied obligation under the oil and gas leases. Judgment should also be entered in favor of DIAMOND SHAMROCK on the drainage issue because there was *no* evidence from which the jury could find that Counterclaimants made demand upon DIAMOND SHAMROCK to protect against drainage.

3. DIAMOND SHAMROCK should have judgment upon the claim of John Hamilton and Martha Francis for drainage because there was no evidence to show that drainage has occurred to Section 33 and the undisputed evidence was that DIAMOND SHAMROCK satisfied any covenant to protect against drainage by the drilling of the John Hamilton 1-33 well, which well is shut in awaiting a pipeline.

4. DIAMOND SHAMROCK should have judgment with regard to ZINKE & TRUMBO, LTD.'s claim of gross negligence because there exists no evidence from which the jury could infer that DIAMOND SHAMROCK was guilty of either gross negligence or willful misconduct.

5. DIAMOND SHAMROCK should have judgment on the claim of John Hamilton, Martha Francis and Morris Richardson for negligence because there is no evidence

from which the jury could infer that DIAMOND SHAMROCK was negligent.

6. Judgment should be entered in favor of DIAMOND SHAMROCK as to both actual and punitive damages for drainage because the award of damages to Counterclaimants Hamilton and Francis for drainage after first awarding Counterclaimants full recovery for alleged destruction of the reservoir would constitute an unwarranted double recovery and would constitute an unjust enrichment of Counterclaimants Hamilton and Francis.

7. Plaintiff DIAMOND SHAMROCK should have judgment in its favor as to the exemplary or punitive damage issue for the reason that there was no evidence of any oppression, fraud, or malice as is required by 23 O.S 1971 Section 9 for an award of exemplary damages; that the necessary threshold of evidence as a basis for submission of the issue of exemplary damages to the jury was never established by the Counterclaimants; that the issue should not have been submitted to the jury.

8. Judgment should be entered in favor of DIAMOND SHAMROCK on each of Counterclaimants' causes of action for the reason that there was no evidence of the value of either oil or gas during the period in which drainage or destruction was alleged to have occurred, and no evidence of the amount of gas or oil allegedly drained from Section 33.

WHEREFORE, DIAMOND SHAMROCK prays that the Court set aside the verdicts entered herein in favor of Counterclaimants and enter judgment in favor of DIAMOND SHAMROCK in the amount of $212,805.60, in accordance with the Motion for Directed Verdict made by DIAMOND SHAMROCK at the close of all the evidence.

Motion for New Trial

In the alternative to the foregoing Motion for Judgment Notwithstanding the Verdict, DIAMOND SHAMROCK

moves the Court to set aside the jury's verdict of November 2, 1983, in its entirety and to grant a new trial for each of the following reasons:

9. The jury's verdicts are so inconsistent on their face as to indicate that the jury was either in a state of confusion or that the jury abused its power. Specifically, the jury's finding for DIAMOND SHAMROCK under its claim for breach of the Joint Operating Agreement is irreconcilably inconsistent with the jury's finding in favor of ZINKE & TRUMBO, LTD. on its claim for gross negligence or willful misconduct and inconsistent with the finding in favor of John Hamilton, Martha Francis and Morris Richardson on their claim for negligence.

10. It was impossible for the jury to find that DIAMOND SHAMROCK had breached the oil and gas leases in question since the leases were not introduced into evidence, nor was any evidence introduced regarding the terms of the oil and gas leases in question.

11. As to punitive damages, there is a total absence of any proof of any act or omission on the part of DIAMOND SHAMROCK which could be classified as malicious, fraudulent or oppressive.

12. The exemplary or punitive damages awarded to Counterclaimants John Hamilton and Martha Francis bear no reasonable relationship to the injury inflicted, if any, upon the Counterclaimants due to the alleged drainage, and said punitive damages are excessive in amount even if punitive damages were otherwise allowable. The award of $1 million in punitive damages was necessarily the result of passion and prejudice on the part of the jury.

13. It was error for this Court to overrule DIAMOND SHAMROCK's motion for continuance filed on October 19, 1983, in light of the fact that on October 7, 1983, the Court allowed Counterclaimants to file an Amended Coun-

terclaim containing three new causes of action and which Amended Counterclaim for the first time sought the imposition of punitive damages.

14. The verdict is contrary to the manifest weight of the evidence in the following particulars:

a. There was no evidence regarding the obligations, either express or implied, imposed by the oil and gas lease in question and there is no evidence that Counterclaimants ever made demand upon DIAMOND SHAMROCK to protect against drainage.

b. There is no evidence from which the jury could conclude that DIAMOND SHAMROCK has breached the oil and gas lease in question, since there is no evidence whatsoever of the terms of the oil and gas lease.

c. There is no evidence of oppression, fraud or malice on the part of DIAMOND SHAMROCK, as is required by 23 0. S., Section 9, to support a basis of determination by the jury that exemplary damages should be awarded.

d. The manifest weight of the evidence shows no action or inaction on the part of DIAMOND SHAMROCK which would not have been taken by a reasonably prudent operator in the same circumstances.

e. The manifest weight of the evidence shows that there was no unreasonable delay in drilling a well in Section 33 under the circumstances of the instant case.

15. The Court committed error in its charge to the jury in the following respects, over the objection of DIAMOND SHAMROCK:

a. By instructing the jury that, if the Counterclaimants Hamilton and Francis established the essential elements of their case and if DIAMOND SHAMROCK had superior knowledge of the facts at the time of demand to protect against drainage, then the burden of proof shifted to DIAMOND SHAMROCK.

b. By instructing the jury that the instant action was one in which punitive damages might be awarded.

c. By instructing the jury that they could use rules of construction in interpreting the contract between the parties when the contract in question was plain and unambiguous.

d. By failing to instruct the jury that, in determining whether or not DIAMOND SHAMROCK acted as a reasonably prudent operator to protect against drainage, the jury could only consider those facts known to DIAMOND SHAMROCK at the time of DIAMOND SHAMROCK's alleged improper actions.

e. By failing to instruct the jury to find for DIAMOND SHAMROCK on each of Counterclaimants' causes of action.

16. The Court committed error in its ruling on numerous evidentiary matters during the course of the trial, all of which affected the substantial rights of DIAMOND SHAMROCK, including the following:

a. In the admission, over the continuing objection of DIAMOND SHAMROCK, of evidence regarding the alleged improper drilling, completion, or operation of the George Travis 1 "A" well.

b. In the admission of all other evidence shown by the record to have been admitted by the Court over the objection of DIAMOND SHAMROCK, or as to which the record shows that the Court failed to sustain DIAMOND SHAMROCK's objections.

17. The Court committed error in failing to dismiss juror Susan Drake for cause, or in the alternative, in failing to substitute the alternate juror for juror Susan Drake when it was discovered that Ms. Drake was personally acquainted with one of Counterclaimants' expert witnesses.

18. This motion is based upon the record and proceedings in this action, and upon the brief filed in support of this motion; however, DIAMOND SHAMROCK reserves the right to supplement and amplify the foregoing reasons for judgment notwithstanding the verdict or new trial following receipt of a transcript of the record.

WHEREFORE, premises considered, DIAMOND SHAMROCK CORPORATION respectfully requests that this Court enter its judgment in favor of DIAMOND SHAMROCK for $212,805.60, and against Counterclaimants on each of their counterclaims or in the alternative, that this Court set aside the jury's verdict of November 2, 1983, in all respects and that this Court grant a new trial.

BY: /s/ H. B. WATSON, JR.
H. B. Watson, Jr.

BY: /s/ RICHARD K. BOOKS
Richard K. Books

Watson & McKenzie
1900 Liberty Tower
Oklahoma City, Oklahoma 73102
405/232-2501

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing ALTERNATIVE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL was duly mailed with postage fully prepaid thereon, this 14th day of November, 1983, to James U. White, Jr. and Gary Davis, Crowe & Dunlevy, 1800 Mid-America Tower, 20 North Broadway, Oklahoma City, Oklahoma, 73102.

BY: /s/ RICHARD K. BOOKS
Richard K. Books

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-82-1754-E

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,
Plaintiff,

vs.

ZINKE AND TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and DAVID B. TRUMBO, an individual,
Defendants,

MORRIS A. RICHARDSON, JOHN HAMILTON AND MARTHA FRANCIS,
Counterclaimants.

* * *

OFFICIAL COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD ON JANUARY 5, 1984 BEFORE THE HONORABLE LUTHER B. EUBANKS IN OKLAHOMA CITY, OKLAHOMA

* * *

APPEARANCES

For the Plaintiff: Mr. H. B. Watson, Jr., and
Mr. Richard K. Books
Watson & McKenzie
1900 Liberty Tower
Oklahoma City, Oklahoma 73102

For the Defendants and Counterclaimants:	Mr. Gary W. Davis and Mr. James White Crowe & Dunlevy 1800 Mid-America Tower Oklahoma City, Oklahoma 73102
Reported by:	Vicki Dilbeck, CSR, CM Room 3011-A, U. S. Courthouse Oklahoma City, Oklahoma 73102 (405) 232-2804

THE COURT: All right. I guess we'll hear from you first, Mr. Davis. Wait a minute. Let me get my papers all straightened up here.

MR. DAVIS: Your Honor, would you prefer to hear from Mr. Watson?

THE COURT: No, no. I'm sorry. I do have you backwards. We'll hear from Mr. Watson first. Pardon me.

MR. WATSON: If the Court please, Your Honor, you'll recall I'm sure that this was a rather lengthy trial involving the plaintiff's claim.

We represented the plaintiff, Diamond Shamrock and their claim for monies due under a joint operating agreement for the drilling of an oil and gas well. And the defendants and counterclaimants had several causes of action, and the Court submitted to the jury each cause of action raised in the pleadings by either party.

The jury in its verdict on the first cause of action, being that of the plaintiff, found for the plaintiff under the Court's instructions that if the plaintiff had substantially complied with the contract, he was entitled and had done the work, paid for the work, and he was entitled to recover or it was entitled to recover. The jury so found rendering judgment or verdict for the plaintiff for the total sum claimed by Diamond Shamrock for the drilling of the well.

The second cause of action was that raised by the cross-claimant, Zinke, Trumbo, in that the joint operating agreement had been modified or amended and changed.

The jury found that such was not the case; that the parties were bound by the contract, the joint operating agreement.

The next cause of action—pardon me was by the defendant Zinke and Trumbo for gross negligence and willful misconduct in the operation of the well.

Now, as you no doubt recall, Your Honor, we didn't—we finished the evidence in the case late on a Friday and the Court did not entertain arguments on the motion for directed verdict. And so it is our position on this particular cause of action that the evidence—the record is void of evidence to support this cause of action they relied upon a expert witness by the name of Berry to establish the amount of their damages.

If you will recall, Mr. Berry was a petroleum engineer, and he testified that he had determined that the value of the property prior to the drilling of the well in question, he had calculated what he estimated the reserves to be prior to drilling of the well. He sponsored Defendant's Exhibits 53 through 60.

If the Court please, I would like to hand up a copy of those exhibits.

THE COURT: All right.

MR. WATSON: And looking at his testimony, and the evidence of the defendants in the most favorable light to the defendants, he testified that they should recover the value of the property. He stated that over the life of the property, there on paying one, he was asked to circle and a number $995,196 which you'll see there, if the Court please, is what he would estimate the income to be over the next six years.

And he also testified that obviously in fixing the value of the property, you could not give people what they would receive over the next six years. You had to discount it. And on the next page, he states his opinion. The reasonable discount factor is five percent which would be $536,708.

Now, they rendered judgment for the $995,000 figure identical to Exhibit 53. It has to be where they got it. And they awarded the defendants and crossclaimants the amount that this witness—and this is the only evidence as to the value that this witness said they would receive over the life of the property, and he had calculated this prior to to the drilling of the well.

They were all hopeful of getting a good well prior to drilling of it. But now we know what is down there. And we know that Mother Nature has not put the reserves under this property that the people thought beforehand.

So, there's no evidence in this record, I submit, Your Honor, that would support a judgment for damages based on the theory adopted by the crossclaimant that they're entitled to the value of this property as if they were selling it.

You may recall I asked the witness on cross-examination, if we pay you the value, the current value of the property which would be this five hundred and some odd thousand dollars, do we get a deed to it, and he said no.

Now, the measure of damages, if any, here would be value before and after. If we have damaged the property, we submit that the evidence doesn't show that we have damaged the property. But clearly, Your Honor, we submit that there is no evidence upon which the jury could assess damages under this cause of action.

He said that he had no evidence as to the net revenue interest of the defendants, Zinke and Trumbo. He shows net revenue interest here up there at the top of this ex-

hibit. And I asked him how he arrived at that, and he said he assumed what royalties and overrides might be against this property. The net revenue interest is .23125. I understand both—

THE COURT: I don't find it. Yes, I do now. I'm sorry. Yeah. Yeah, I do.

MR. WATSON: And he had assumed their net revenue interest. Well, of course, they're entitled to no more than the necessary revenue interest in the property would entitle them to, and of course, that cannot be assumed either by the witness or by the jury.

So we respectfully submit as to this particular cause of action, that there is no evidence upon which the plaintiff can prevail, and respectfully submit that it should not have been submitted to the jury; that they failed to prove a cause of action; and that we would be entitled to judgment notwithstanding the verdict.

However, if the Court should hold otherwise, we, nevertheless, state that clearly, we would be entitled to a new trial because under the evidence submitted --

THE COURT: Well, that's the thing that, Mr. Watson, still runs through my mind. I think that verdict, insofar as your claim and the main crossclaim, was just about as inconsistent as you can make it.

First of all, the jury awarded you compensation for the pro rata share of the cost of completion, and et cetera.

Under the Instructions, it's said they could do so if they found that you completed it in a good, substantial and workmanlike manner. And then at the same time, awarded the other side damages for your failure to do so. That is, they said you did it, therefore, you're entitled to compensation. But in the same breath, same verdict, said you were grossly negligent. And you didn't complete it as provided for in the operation agreement which should have

relieved the payment. See. In addition, to relieve payment authorized damages, but when they do both, I just cannot see any way in the world that it's not an inconsistent verdict that must be set aside.

I do want to hear Mr. Davis, because I have got so much confidence in him. He may even convince me that the original thinking is wrong. It seems that maybe the drainage thing can stand because there is no inconsistency in the claim there as I tentatively view it.

Now, go ahead.

MR. WATSON: May I speak, if the Court please, and I'll try to be brief on the question of judgment notwithstanding the verdict on several of these causes of action.

THE COURT: Go ahead.

MR. WATSON: If I may, I'll go to the drainage question since you've raised that. We feel that we're entitled to judgment notwithstanding the verdict on the question of drainage for several reasons.

One, this is an action for breach of an implied covenant to protect against drainage. The parties entered into a contract obligating it to an oil and gas lease; oligates the lessee to perform certain acts.

Now, neither the Court nor the jury has that lease before them. There is no evidence in this record as to what the terms and provision of that lease are. There is a stipulation whereby we acknowledge a valid and existing oil and gas lease dated a certain date and filed in book and page, but certainly these people are free to contract and to agree on the provisions of that contract.

And how can this Court or any jury say that we have violated the provision of the contract if they don't even know what the provisions are.

And the position that we take, even if the Court should disagree with us and say they can sue us for breach of

contract and not introduce the contract and not prove the terms of it, even if the Court should hold against us on that point, I respectfully submit that there is no, not one scintilla of evidence in this record whereby you can arrive at damages for drainage.

They didn't prove when the drainage occurred. They didn't prove the amount of hydrocarbons drained, nor did they prove the value of those hydrocarbons.

Now, how else can a jury arrive at a figure—where in the world they got this $32,499.00, I don't know.

Furthermore, there is no evidence of demand for us to protect against drainage. The jury was instructed that the lessors had to—in Instruction Number 2, that the lessors had to make demand on us. This is a gas well. We elected to shut it in. If the lessors are dissatisfied with the shutting in of that well and waiting on a local pressure line, we say that a cause of action has not arisen when the parties are in agreement.

And no lessor took that stand. There was not one scintilla of evidence that they disagreed with the fact that that the well should be shut-in. So if they agree that the well should be shut-in, how can they say that they have been fraudulently drained.

Is the Court going to presume fraud when the parties that allege the cause of action don't even take the stand. They don't even say we asked them to turn it on the line. They don't say we disagreed with the operators' decision to shut-in the well and await a low pressure line.

Our testimony was, and the jury found that we had not failed to market the gas. That's a separate cause of action. Said we should have marketed the gas. The jury found that we acted as a prudent operator in awaiting the market.

So no question; there is no consistency in those.

THE COURT: Can they not, though, have said that the drainage will be a necessary consequence of ruining this well. There is no—the evidence was if the jury believed it, and I guess they did, on this one lease, so whatever is fraudulently drained is going to be drained by your surrounding leases.

MR. WATSON: Are we saying then that they can recover for what might happen in the future? I didn't know that that was their theory of the case.

THE COURT: Well, there is evidence to that effect.

MR. WATSON: Right. That is so, Your Honor. I don't think the evidence supports the fact that any amount of hydrocarbons will ever be drained from this tract, and what the value of them would be.

Obviously, how long before this drainage takes place—

THE COURT: Well, your position was that the defendants' theory is incorrect, that a new well can be drilled right exactly alongside or where the other one was.

MR. WATSON: That's correct. If anybody would drill it.

THE COURT: Yeah.

MR. WATSON: But unfortunately, we found that there is not much reservoir in there.

THE COURT: I see.

MR. WATSON: And no one wants to drill it. They, Zinke, Trumbo, said they wouldn't drill one there. All the witnesses said they wouldn't drill another one.

So if it would not be commercial to drill another well, we would not have an obligation to protect it.

THE COURT: I may have misconstrued the position of the defendants in that regard, and we'll let Mr. Davis talk

to it. But that was my memory of some of the evidence in the case.

MR. WATSON: I think the lawsuit imposes upon it only a duty to drill wells to protect against drainage if it would be economic to do so.

THE COURT: Well, I suppose that's the law. It should be.

MR. WATSON: Yes, sir. And I don't think there's any question about it. I believe it's—

THE COURT: Well, wasn't it, though, Mr. Watson—this is a problem when there's a long lapse between the trial and the ruling on the motion. Many, many cases in between, and wasn't it a part of the theory that you could not, if you wanted to drill another well, that there's no other location on that lease that could be approved by the Corporation Commission.

So the jury could have said well, it would have been a commercial producer and a good one if it had been drilled, done right. And now we believe their case; that there is no way to drill another well. So for that reason, they have lost—royalty owners have lost—

MR. WATSON: Yes, sir. They took the position that another well could not be drilled there.

THE COURT: And you disagree. You think he could get a permit easily from the Corporation Commission, but it just wouldn't be economically feasible to do it.

MR. WATSON: That's right. And I don't think there was any evidence to contradict the economics of another well. I don't think anybody wants another well drilled there; would put up the money to drill another well there. Even their own witnesses, their experts—

THE COURT: Let's hear from Mr. Davis. Then I'll hear you further, of course, unless—did you have any other features you wanted to touch before—

MR. WATSON: There's one other, Your Honor.

THE COURT: Go ahead. I'm sorry.

MR. WATSON: If you don't mind.

THE COURT: Sure, certainly don't.

MR. WATSON: That is on the question of damages arising accruing to the lessors. The jury awarded them $971,179.00 for damages to the well; that they damaged the well.

Now, how could that figure be arrived at. And if you will refer starting on Page 3, Exhibit 55. That's the third page. I have clipped those exhibits together.

THE COURT: I see. 55 is the third page of this.

MR. WATSON: Now, the way you arrive at this figure of $971,179.00 is to take—

THE COURT: Wait a minute. Go ahead.

MR. WATSON: We are talking about the defendant, Francis, on this page. You'll see the top. It says Martha N. Francis.

THE COURT: Right.

MR. WATSON: One of the lessors. Now, if you will look at the net income and cumlative, this would be the same column that was used that I called your attention to on the prior exhibit. This is the amount of money that Mrs. Francis would receive according to this witness after a period of six years from now if that would be produced.

THE COURT: Explain that. You used that term with reference to the first part of it. Six years. Where is this exhibit? Runs through 30 years.

MR. WATSON: Yes, sir. But if you will note, the money stops at six.

THE COURT: Oh. I follow you, yeah. Same identical, yes. The figures are identical thereafter. I see now.

MR. WATSON: I didn't explain that.

THE COURT: Well, I guess I didn't look at the exhibit.

MR. WATSON: Now, the computer is set up on a 30 year period, but the well only lasts six.

THE COURT: I see. I see.

MR. WATSON: So, according to this figure as to what she would receive, if the reserves were there that he calculated before the well was drilled, it would be $102,258.00

Now, if you take that figure from each one, I don't want to go through this for you, but you take—go through those pages and take that same figure of what each royalty owner would receive over the next six years according to this reserve estimate prior to to the drilling of the well.

It comes up to the identical figure, $971,179.00 which is what the jury awarded. That figure for Hamilton is $626,140.00. And for Richardson, is $242,781.00. And you add them up and that's what they would total, what the jury awarded them.

There again, I know this witness testified that under no circumstances would the property be worth that. You would have to wait six years to get it.

And so one other point if the Court—

THE COURT: It doesn't reduce it to present value at all. The jury didn't—

MR. WATSON: On the next page—

THE COURT: But I mean the jury didn't.

MR. WATSON: That's correct.

THE COURT: I see that.

MR. WATSON: And one other point here I'd like to raise if I may, Your Honor, the defendants in the cross-complaint, Hamilton and Francis are our lessors. We have

a contract, an oil and gas lease with these people. Richardson, the crossclaimant, Richardson, is Zinke and Trumbo's lessor.

Now, we have no privity of contract with this man. He contracted with Zinke and Trumbo to develop this property. And they voluntarily entered into this joint operating agreement making Diamond Shamrock their agent in this operation.

Now, did they convey to us the liability under their oil and gas lease? Under this verdict, the man we didn't even contract with is being awarded a judgment against us for the way we operated under the oil and gas lease that Zinke and Trumbo had entered into. You see. They all ganged up on Diamond Shamrock.

First just Zinke and Trumbo was in this case because we are suing them for what they owed. Then they went out and got our lessors and their lessors to sue us.

What obligation do we owe their lessors? Are they obligated to him under their contract to properly operate the premises; and by delegating the operation to another, can they relieve that responsibility and that liability to their lessors? We certainly have assumed no liability to their lessor. And under this theory, their lessor—

THE COURT: Undivided lease, Mr. Watson. You owe that where you're the operator of the entire unit, don't you, the same duty to all irrespective of who they originally leased to. I would have thought so.

MR. WATSON: Well, I think not. This is a voluntary joint operating agreement. And in which the owners of the lease hold interest in there. Say, we are going to go together and we are going to appoint one of us as operator.

And I submit to the Court that that does not relieve Zinke and Trumbo for their obligation to their lessor. I

think they can sue us under the joint operating agreement. Say we didn't perform it, but nevertheless, their lessor has to look to them. If he wants to send a bumpkin out there, they have breached their oil and gas lease with their lessor. But yet we have Richardson coming in here and suing us through the same lawyers for breach of this duty that is owed from Zinke and Trumbo to Richardson.

So we submit that clearly under this particular cause of action that if the Court should find that there's evidence to indicate that we're liable to our lessor. Certainly we're not liable to the lessor of Zinke and Trumbo.

One other point if I may, and that is the question of punitive damages. They rendered against us for a million dollars for punitive damages. And I'm sure the Court will recall that that was injected into the case a few days prior to the trial, and we asked for time to defend and get ready for that, and so now we are stuck with a million dollars in punitive damages. And we take the position and the Court so instructed the jury in Instruction Number 9 that if they found that we had allowed this fradulent drainage to occur; fraudently being because we are over here and own a hundred percent of the draining well, and we are stealing their—stealing their gas is what it amounts to, that the jury could award punitive damages.

Well, number one, if they have not proved actual damages, the 32,000 in actual damages, they wouldn't possibly be entitled to punitive damages, that there can be no willful, malicious conduct on our part in shutting-in that well in this instance, and that that would be the basis of the fraudulent drainage.

We shut in the well where we own three quarters of the production. Well, where we own a hundred percent, there could be no willful and malicious conduct on our part unless our lessors had not agreed with our actions. And here, again, I don't mean to be repetitive, but there's not one scintilla of evidence that this lessor said that we had

acted in a willful, malicious manner; that they had not agreed with everything we did. So to allow—

THE COURT: Well, Zinke and Trumbo argued there, though, that the agreement was modified, we'll go in and participate in the completion if you will do it this way rather than what you proposed. The evidence was before the jury that you ignored them. Your company did what it agreed to do, but if that's the case, the question I have would punitive damages not be disallowed under the theory of it arising out of a contract.

MR. WATSON: Well, I think if your actions are tortious, if you commit a tort in the performance—

THE COURT: Tortious breach of contract.

MR. WATSON: Yes, sir. But the thing that the Court must remember, Your Honor, is that don't be separating the amounts. Don't be mixing apples and oranges. We are talking about a cause of action by our lessor. Zinke and Trumbo doesn't have anything to do with it. The lessors are saying that we committed fraudulent drainage. We have to look at this cause of action separate from the other.

THE COURT: Punitive award, though, to Zinke and Trumbo—

MR. WATSON: No, sir. It went to the lessors.

THE COURT: I'm sorry.

MR. WATSON: It went to the lessors.

THE COURT: I thought it went to Zinke and Trumbo. Then I do stand corrected. I didn't—I'm getting it. All right.

MR. WATSON: You see. The punitive damages was directed to this theory which is relatively new. And if you'll recall, the Tenth Circuit case, the Space case, in which the Tenth Circuit set out some pretty firm guidelines as

to what constitutes fraudulent drainage. And it was not until then really that we had much law on this question of fraudulent drainage. That Hall Jones case in the state court, but clearly there you have to prove that the thieving well was designed to steal the oil or gas from over here, from the well being drained. You see. You have a bigger interest.

The facts here would fit Space. You have a bigger interest over here. So you don't care what happens over here. Let these lessors—just let them be robbed. They have their hands tied. They cannot develop the property. You have both leases. And it's better for you to take the hydrocarbons out of this well.

Well, such was not the case here, I submit, Your Honor. And that was the theory and the basis upon which they claimed punitive damages and the basis, the only basis upon which the jury could have awarded punitive damages.

And clearly, one, they didn't show drainage, and two, they didn't show that the shutting-in of the well was a willful, wanton and malicious act. To the contrary, there is no evidence that both parties to the contract, lessors and lessee were not in agreement on shutting it in.

THE COURT: All right. Thank you. I may want to hear from you again after Mr. Davis presents his arguments. Go ahead, Mr. Davis.

MR. DAVIS: If the Court please, what I'd like to do, if it's all right with Your Honor, would be to simply dispose of these things that I regard as inconsequential or sort of minor issues that Mr. Watson has been arguing.

THE COURT: Whichever way you want.

MR. DAVIS: I'll start from the rear and work my way backwards.

THE COURT: That's fine.

MR. DAVIS: Mr. Watson mentioned the thieving well. Well, that's what it was. It was a thieving well, and that's what the Space case was based on, Your Honor.

Your Honor will recall that this Travis Well, which is sitting over in Texas, as opposed to the Hamilton Well in Oklahoma that we are trying this lawsuit about, had been operating, was operating full blast, and there at least, according to our expert witness, it was draining gas from these three lower zones that were completed successfully. And it was a stealing well.

The Diamond Shamrock witness got on this witness stand and testified that the only reason—this came out in his deposition that Mr. White read in evidence—that the reason that they blocked up these three zones, these three lower zones of this well, was because they didn't want to cross state lines. Of course, that's no excuse.

Mr. Zinke testified that he had demanded that if these three zones, in fact, would produce, start producing. But they never produced, and they haven't produced to this date.

I can't imagine a worse case or a better case for reckless conduct. And just the hell with you. This well, we own a hundred percent. We are going to produce it. This well, that we own only seventy-five percent of it, just tough on you.

And the jury believed that, and that frankly was the almost unrebutted evidence.

Now, with regard to the this question of demand and the lease, we had two pages, Your Honor, first two pages of the pretrial order that covered all of these incidents of ownership, who owned what in the lease. We stipulated to that in the pretrial order.

We had all kinds of testimony during the case about the lease, what its terms were; that the law of Oklahoma

and the law of the Tenth Circuit there, implied covenant against drainage in every single Oklahoma oil and gas lease. They have to protect it against that. And they have to protect their own lessors.

Now, that is as far as I'm concerned, that's the end of punitive damages on the drainage issue. We had a mountain of evidence, not only through our own witnesses, but through the witnesses on these values questions. I think, Your Honor will recall that Mr. Berry testified that this value, this discounted value was based upon prices that were lower than the actual market price.

Furthermore, and I asked the jury to take them with them to the jury room. We had records from Diamond Shamrock out of their own records as to what this Travis Well was producing and what the estimated reserves in the Travis Well were and what the reserves were in all four zones of the Hamilton Well.

There figures of reserves were much higher, much higher than Mr. Berry's that the jury based their verdict on. So that's, as far as I'm concerned, just plain nonsense.

THE COURT: Well, the jury had to base the verdict on this one, though, to get to the exact dollar.

MR. DAVIS: Exactly, and they did, but they had not only our figures, Your Honor, but they had the figures from Diamond Shamrock as well.

THF COURT: But they had your discounted figures too, which they ignored.

MR. DAVIS: That's right Your Honor, but they had figures from Diamond Shamrock. If they had taken Diamond Shamrock's figures over our own, well, they would have given us much more damages, much more actual damages than they did.

And these actual damages, of course, just related to these three lower zones that actually were completed successfully by Diamond Shamrock.

Now, with regard to the question of demand, don't have to give demand if it's a useless thing. Wouldn't do any good.

Mr. Zinke again testified that he said get it producing if these wells will produce. The Diamond Shamrock witness said they weren't going to because they weren't going to cross state lines.

You don't need to notify somebody of something if it's absolutely worthless. Furthermore, according to Professor Hemmingway, who's professor of oil and gas at the University of Oklahoma, and I have got his text here, if the Court wants to read it, where your suing for damages as opposed to asking for cancellation of a lease, demand is not necessary.

And the reason being that when you're suing for forfeiture cancellation, you're asking for some kind of equitable relief. There in some cases, they have said, some Courts have said that demand is necessary. But Professor Hemmingway makes the flat statement that where you're suing for damages, no demand is necessary at all.

Now, if there was any error, and I don't think there was, because there was fact on this demand, but if there was any, it would certainly—it is certainly harmless error under Rule 61.

Now, I think that's basically all Mr. Watson talked about.

Oh, got to get into this. He talked about the verdicts in favor of the land owners. And that it wasn't proper because it was some contractual—he had no liability because it was a contractual liability.

Your Honor, our lessors had no contract with Diamond Shamrock. When you come onto someone's property and damage it, and if you're negligently doing so—and this is what the Court instructed the jury—then you're responsible for that negligence. And, you know, people just have

to be responsible for their own acts. And this is not a matter—

THE COURT: The operating agreement irregardless of the lease issues—

MR. DAVIS: The operating agreement doesn't have a single thing to do with the land owners.

This was exactly a matter between Zinke and Trumbo. This operating agreement was a matter between Zinke and Trumbo and Diamond Shamrock Corporation, and there isn't anything in that contract that could adversely affect in any way these verdicts in favor of the land owners.

And before I get into the main point Your Honor is concerned about, I want to say unequivocally that the law is universal, and I don't think there is a case in the world to the contrary including the Tenth Circuit case where that—where you have different parties even if there, you could say they're inconsistent verdicts. A verdict involving Zinke, Trumbo and Diamond Shamrock Corporation is to have absolutely zero effect on any verdicts involving Zinke—and any verdict involving the land owners.

And the Diamond Shamrock/Zinke, Trumbo verdicts are put into one capsule. The verdicts between Diamond Shamrock and the land owners are put into another.

I can cite here from Corpus Juris Secundum. I can read from the Cypert (phonetic) case in the Tenth Circuit. Your Honor may be interested in that case.

Just very simply, there was a case where a son was in an automobile accident, Cypert vs. Baker, arising out of the Northern District of Oklahoma. Passenger was in—or son was in an automobile accident, and he and his father sued the driver. A verdict—the father was trying to recover the medical expenses that he paid on behalf of his son.

The jury returned a verdict in favor of the father and against the son. And it went up to the Tenth Circuit. Well, the Tenth Circuit ruled for support of the jury verdict based on a procedural basis but then we go onto say, Your Honor, this is 399 Federal 2nd, 927, 1968. Cypert vs. Baker arising out of the Oklahoma Tenth Circuit Court of Appeals. I'll just read from Page 929.

"Although it appears that in cases such as this which have been consolidated for trial because of common questions of law and fact, different verdicts on the question of liability are not considered to be in consistent." And then for authority, they cite a bunch of cases. They cite a bunch of cases, but the first thing they cite is out of Corpus Juris Secundum.

And I want to read to the Court just so that there won't be any misunderstanding about what the law is on the different verdicts. I thought I had it here, Your Honor. Can't find it. But the whole bottom line is, of the whole thing is that inconsistencies just makes absolutely no difference where you're talking about different verdicts.

And there is a Supreme Court case of—United States Supreme Court case to the same effect.

THE COURT: You've there look at Page 5 of your brief. You cite Corpus Juris Secondum.

MR. DAVIS: Right. I believe it may be quoted at length there, too, Your Honor.

THE COURT: Well, you cite the Section 16 of the Corpus Juris Secundum.

MR. DAVIS: That's correct, Your Honor.

THE COURT: From Volume 17A. That's all right if you don't put your hand on it.

MR. DAVIS: Cannot put my hand on it right now, Your Honor.

THE COURT: All right.

MR. DAVIS: But it's conclusive. It's the law that verdicts affecting the land owners should have no effect on the verdicts affecting Diamond Shamrock.

Furthermore, so where we are now, what were looking at and I think what Your Honor is most concerned about, is the two verdicts involving just Zinke Trumbo.

I got mad when I read the plaintiff's brief because just in my opinion, there is a misleading statement right at the start. And Your Honor referred to it.

And that is that Instruction Number 4, which relates to the recovery by Diamond Shamrock for its costs of completion, required that Diamond Shamrock be found to have acted as a reasonably prudent operator.

That was not the Instruction by this Court at all.

THE COURT: No, no.

MR. DAVIS: There's nothing --

THE COURT: In order to fulfill the contract entitled it, however --

MR. DAVIS: What Your Honor—as a matter of fact in my judgment, Your Honor, and I'll tell you what the—just a second. That if Your Honor had instructed that Diamond Shamrock act as a reasonably prudent operator in order to recover its costs, that would have been error.

And I want to tell you that there's nothing in the Court's Instructions. There's nothing under the Oklahoma law; there's nothing in the contract between Zinke and Trumbo and Diamond Shamrock that in any way requires that Diamond Shamrock perform as a reasonably pursuant operator in order to recover its costs.

Now, what we need to do is precisely—is precisely what the jury did. And that is look, read the contract because that tells the whole story or telling a good part of it.

Now, Your Honor, do you remember when Mr. Watson had Mr. Trumbo on cross-examination? He was contending vehemently why didn't you pay your costs of completion. Why didn't you pay your cost of completion. You have to pay your cost of completion whether we're liable to you for not acting like a reasonably prudent operator for gross negligence or not. The contract requires that you pay. They're independent obligations of one another, totally independent, according to Mr. Watson when he was examining Mr. Trumbo. The jury believed him.

And the inconsistency now is to come into here and contend that because what Mr. Watson said the contract said and what the jury did is now inconsistent.

And I have got the contract here and I just want to go through it very briefly because this is the issue in the case as I understand it, Your Honor, as to where part of it is going to be retried.

Page 3, the first article. It's article 5. And remember, Your Honor, this is an operator's contract. It's a Diamond Shamrock contract. It was put together for the operator by the operator. And this was the contract that was sent to Zinke/Trumbo for signature.

And the Court sent it to the jury for interpretation. "Article 5, operator. A. Designation and responsibilities of the operator." This is on Page 3.

And then this provision is where it says that, "Diamond Shamrock shall act in a good and workmanlike manner, but it shall have no liability as operator except for gross negligence." Okay. That's a provision.

Then we go over to Page 8. And we are now on Article 7, and we are taking about the expenditures and the liability of the parties for those expenditures. "Payments and accounting. Each such statement and invoice for the payment in advance of estimated expenses shall be submitted on or before the 20th day of the next succeeding

month." Mr. Watson was going through this on cross-examination.

"Each party shall pay to the operator its porportionate share of such estimate within 15 days after such estimate and invoice is received."

Shall pay. Their isn't anything in here that says you get out of paying if Diamond Shamrock hasn't acted as a reasonably prudent operator.

Then we get down here to Option Number 2 which is the completion provision that we argued about as to whether there would be an election or not. "Such election when made," and the jury held that Zinke Trumbo had elected, "shall include consent to all necessary expenditures for the completing and equipping of such well including necessary tankage and service facilities."

Has nothing to do with this back over in Article 3 where we're talking about liability.

Then let's go to the accounting procedures, Your Honor. It's on Page 1 of the accounting procedure, Provision Number 3. "Each non-operator provided for in the agreement"—well, wait a minute. "Each non-operator shall pay its proportion of all the bills within 15 days after receipt."

Mr. Watson was very upset when we hadn't paid our bills within 15 days after receipt. Said we had to pay them regardless of liability of Diamond Shamrock.

Provision number 4. "Payment of such bills shall not prejudice the right of any non-operator to protest or question the correctness thereof."

Okay. So what the jury said, and what Diamond Shamrock was contending the jury should do, was to say that the obligation to pay for completion costs is independent and a totally separate matter with regard to the liability of Diamond Shamrock for gross negligence and not acting as reasonably prudent operator.

Now, I think if you just interpret the contract the way the jury does, that ends it. But there are other reasons that I want to tell the Court about.

In my judgment it would have been an impossibility, total absolute impossibility for the jury, with regard to Diamond Shamrock and Zinke Trumbo, to have come back with a more consistent verdict than they did.

And the first reason is that if you read the contract, that's what the contract seems to require. The second reason is—Your Honor will remember that in this particular Hamilton Well there was just one completion. In other words, they completed all four of those intervals together.

THE COURT: Right.

MR. DAVIS: Now, three of them were okay. And this lawsuit didn't concern these three intervals. How is Zinke Trumbo going to participate in the production from these three intervals? How is it going to participate in the production of these three intervals if it doesn't pay its share of the completion costs?

Now, I tried through the Diamond Shamrock witnesses to separate or define some basis for separating the costs that might be attributable to this particular interval opposed to these three other intervals. But I obviously wasn't successful.

Frankly, I can see why the jury couldn't separate them because it was one act. It was one act that was completing all those intervals together.

If Zinke Trumbo doesn't pay for these three intervals, doesn't pay it's cost of completion, then it's not entitled to participate in the production from these three intervals.

THE COURT: Well, they didn't want to. They said it's not worth a hill of beans. These three are not. It's the fourth one that may be commercially productive if you will do it right.

MR. DAVIS: But the testimony of Diamond Shamrock was these three intervals were good.

THE COURT: Surely, Mr. Davis you don't expect me to believe that the jury was that selective; that they could believe Mr. Watson on a little, old insignificant part and not believe him on the big part. I don't think—and besides that, they were told to follow the law and apply it to the evidence.

What lawyers said is not evidence. And they were so told at the beginning of the case.

MR. DAVIS: What the jury concluded, I'm convinced of, is that—and this is where another total consistency comes about, besides the contract is that if Diamond Shamrock or if Zinke Trumbo didn't pay the share of the costs of completion, they could not participate or could not recover the full value of the reserves from the damaged portion because otherwise you're looking at double recovery.

In other words, in order to get the reserves, you have to pay the cost of completion. Well, if they didn't pay their share of the cost of completion, why are they entitled to the full value of the reserves. I mean that—I think that's the short of the thing. You say you want damages for your reserves. Well, then you've to pay what it costs to get those reserves. You didn't get these reserves, but you still have to pay what you would have had to pay.

THE COURT: Well, now your defense to their claim was we cannot owe them those completion costs for the reason that you didn't do it properly. You didn't follow the operating agreement, right?

MR. DAVIS: Your Honor, our reason was, and the jury didn't follow us on this, our reason was that we did not owe the costs of completion was that we elected not to participate in the completion. But the jury decided that we had elected to participate in the completion.

THE COURT: But you alleged we don't owe it because they didn't do it as directed.

MR. DAVIS: No, Your Honor. We alleged that we did not have to pay because we didn't—we didn't elect to participate. And that's a big difference.

THE COURT: Well, the evidence was you elected to participate if the method of completion would be changed to suit your directives.

MR. DAVIS: And the jury said we didn't win on that case. They said that we were in for the completion.

THE COURT: I think to the contrary. They said that you did, and that seems to me that purely the evidence in the case that Diamond Shamrock agreed to modify the method of completion, then didn't do it. And I think that's the reason that you won your counterclaim.

MR. DAVIS: Well, there's no question about that. There was tons of evidence on the actual—

THE COURT: Almost unrefuted. That's right. That they didn't agree. I mean they didn't comply with this oral agreement that was made.

MR. DAVIS: That's right. But the point I'm making is if—and the first thing you've got to look at the contract and take the jury's interpretation of the contract. And then these other things are the reasons that I say I think the verdict is, in addition to the contract, the verdict is consistent. But there's a fourth reason.

That's under the law of Oklahoma, under the substantive law of Oklahoma, you can sue somebody for not paying your bills. And you can still be—and recover for not paying your bills. And then you can bring another lawsuit and sue them for negligence on those services and recover the value. And most recent cases on that—

THE COURT: Repeat that. I didn't follow you completely. You've got to do it all in one case, surely.

MR. DAVIS: No, Your Honor. You do not.

THE COURT: Oh?

MR. DAVIS: You do not have to. And the Supreme Court of Oklahoma has spoken.

THE COURT: All right.

MR. DAVIS: It's the case of Wabanese (phonetic) versus Harris, 610 Pacific 2nd, 782, Supreme Court of Oklahoma, 1980.

In this case, you know, an attorney sued his client because the client wouldn't pay the bill for services that he had rendered. The client or the attorney won, and he got judgment in his favor.

Then the client, the same—precisely the same services were involved, everything was the same. Then the client, after that judgment became final, brought a new lawsuit and sued to recover their damages as a result of the negligent representation by this attorney.

They got a judgment for negligent representation by the attorney. The Supreme Court of Oklahoma said that's totally proper, that these are independent causes of action. And that recovery on one is not to affect the liability on the other.

THE COURT: All right.

MR. DAVIS: That's the law of the State of Oklahoma, at least.

THE COURT: General rule of the Doctrine of Res Judicata precludes the questions that were raised and all that could have been raised in that later case.

MR. DAVIS: I agree with that.

THE COURT: Maybe there did they have later facts to show that the lawyer had been negligent; something that they didn't have at the time the original claim was brought?

MR. DAVIS: Nothing, Your Honor.

THE COURT: All right.

MR. DAVIS: Precisely the same thing, and that's what these lawyers were saying. You should have raised it in the first case.

But the whole point is that even when you're talking about a contract—and incidentally, I'm very familiar with Mr. Watson's side of the case because I lost his argument in the District Court down in El Reno just recently.

I contended that I wasn't liable on a contract because of a provision in the contract. But the Court said well, that's fine. I agree with you, Mr. Davis, but he said you're still liable for tortious acts committed under that contract. And he is right. The Judge is right.

THE COURT: I don't believe that would float in federal practice. That's procedural law that the state may be bound by, but I don't believe that the Federal Court is bound.

And that's not a substantive interpretation that would be binding on a diversity court, I don't believe. I just don't think that we are going to be required to hear the same case three or four times, but I'm glad to hear that.

MR. DAVIS: Your Honor, as this Court knows, again, I hate to use the word universal, but the universal law is if there is any way, any way to uphold a jury verdict—

THE COURT: Right.

MR. DAVIS: —you must do so, or otherwise you're messing around with the parties' Seventh Amendment rights.

And right here front of me is the U.S. Supreme Court case Atlantic and Gulf Stevedores vs. Ellerman Lines (phonetic). It was a case where—it's 369, U.S., 355.

It was a case where a workman was injured, and he sued the stevedore company and he sued the owners of

the vessel. And the jury brought in a verdict against the stevedoring company for negligence. They returned a verdict in favor of the stevedoring company against the owners.

There was a contract between the stevedoring company and the owners which made, under those circumstances, which made the stevedoring company liable to the owners for any such negligence.

And the U. S. Supreme Court said look, that's a jury verdict. And we're not going to get into exploring their vagaries as to why they found for one or another.

THE COURT: Certainly.

MR. DAVIS: That's the jury's business. And Justice Frankfurter, I love what he said—

THE COURT: Now, we must concern ourselves when they find for both.

MR. DAVIS: Your Honor, that's exactly right. It's not the province of this Court to get in and figure out why they might have found for Zinke and Trumbo on one thing and for Diamond Shamrock on the other.

When one of my favorite judges—

THE COURT: Well, you argue at length here on that very thing. You said they did it because he was cross examining one the defendants here in that regard.

MR. DAVIS: But the jury chose to believe Mr. Watson on his interpretation of the contract.

THE COURT: We don't know that that's the case. We don't know because we don't inquire into why the jury did what it did.

MR. DAVIS: But in any event, there's ample basis under the contract for the jury to do just exactly that they did.

And this contract was sent to the jury to be interpreted by the jury. And that—you forget about everything else,

but the contract in and of itself is a clear way for the jury to have found for Diamond Shamrock on its completion costs and to have found for Zinke and Trumbo for the gross negligence of Diamond Shamrock.

There are two different standards, two different causes of action under the contract. And I think the Court properly instructed the jury on this point.

And the jury interpreted the instrument, the contract; took the contract to the jury room.

If there's something else that I could say that would—

THE COURT: I don't think of anything right now. Do you want to respond to that, Mr. Watson.

MR. WATSON: If I might just briefly, Your Honor. I want for speak to the inconsistency. I want to speak to the inconsistency and the matters I spoke to previously. But the thing that concerns me here, if the Court please, there is a lot of money involved here. And there's a lot of expense in the trial of this case.

And I respectfully submit that clearly we have two contracts here. One a joint operating agreement, and one an oil and gas lease and the causes of action on behalf of the lessors for breach of an oil and gas lease contract. The cause of action for Zinke and Trumbo was for breach of the joint operating agreement contract. And the jury in both instances found for both parties.

And either the contract was breached or it wasn't. But with regard to the facts, if the Court orders a new trial because of the inconsistencies of these verdicts, we respectfully submit that they have failed to prove a cause of action on those various allegations of theirs. And those in which they have failed the first time around to prove a cause of action, we shouldn't be forced to try on the second time around.

And if the Court please, I submit that this damage verdict for Zinke and Trumbo of almost a million dollars, $995,000.00, that they failed to prove the damages if any they sustained if we did not perform those completion operations in the manner in which we should have—

THE COURT: How do you recall the wording of the answer of the defendants to be? How did they defend against payment of their pro rata share of the operating costs? What did they allege? What facts did they say excused them of payment? Wasn't it because you didn't do it as --

MR. WATSON: We breached the contract.

THE COURT: Right.

Mr. WATSON: We didn't perform. The contract provides --

THE COURT: And if that be the case, then you subject yourselves to damages.

MR. WATSON: That's right. And why would they have to pay under a contract that's been breached?

THE COURT: Then, I'll tell you, gentleman, I have looked at this and looked at it, and I don't see anything for the Court to do in keeping with my oath, as busy as we are, except just to order the whole thing retried.

I'm going to grant you a new trial on all issues. Now, we might be able to clean the issues up a little bit more. That will reopen discovery and maybe have another pretrial, but I guess that jury either was confused or they didn't understand the instructions. Or they were confused on what the evidence was.

And I hate to say this, just one of those kind that hate to say no. And so we'll just give everybody what they want. But this is an inconsistency that we just absolutely cannot live with.

I first thought that maybe I could grant the request to leave it intact with respect to the drainage claims, but I'm inclined after hearing these arguments to believe that a new trial should be granted on that also, if for no other good reason than you got an appeal going up on part of the case and whether or not our hand should be tied with respect to retrial of the remainder of the case, and that—but that's not the main thing.

I just think in my own mind that the verdict is so inconsistent with respect to the findings on all of the claims that I have just got to set it aside and start over.

If either of you or any of you wish to continue with discovery, now, you may do so. And we'll get it on a pretrial docket as soon as I can get it there.

But don't expect that to be right away because we have got criminal cases coming up we must give priority to. And our dockets are so terribly crowded that we just don't know. It may be a long, long time. We need about twice as many judges as we have. But they won't give them to us.

And you'll just have to kind of await your turn.

But that's going to be the order of the Court, and a new trial granted on all aspects of this case. The verdict of the jury vacated, set aside and held for naught as being so terribly inconsistent that this Court cannot in good conscious allow it to stand.

You prepare the order now.

MR. WATSON: Yes, sir.

THE COURT: Because it was your motion really that was the vehicle that got us here. Get it approved as to form bring it in to me.

MR. WATSON: Yes, sir. We'll do so.

THE COURT: Thank you, folks.

(Conclusion of proceedings.)

CERTIFICATE

I, Vicki Dilbeck, C.S.R., C.P., C.M., an Official Court Reporter for the United States District Court for the Western District of Oklahoma, do hereby certify that the above and foregoing hearing was by me taken in shorthand and thereafter transcribed, and that it is accurate and correct, and that it was taken on the 5th day of January, 1984, and that I am not attorney for or relative of either of said parties, or otherwise interested in the events of said action.

In witness whereof, I have hereunto set my hand this 28th day of February, 1985.

/s/ VICKI DILBECK
VICKI DILBECK, C.S.R., C.P., C.M.
Official Court Reporter
U. S. District Court for the
Western District of Oklahoma

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 85-8017

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Appellant,

vs.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual, MORRIS A. RICHARDSON, JOHN HAMILTON, and MARTHA FRANCIS,

Appellees.

[FILED April 29, 1985 in No. 85-1698]

PETITION FOR PERMISSION TO APPEAL

COMES NOW Petitioner, DIAMOND SHAMROCK CORPORATION ("DIAMOND SHAMROCK"), and, pursuant to Rule 5, F.R.A.P.,respectfully requests permission to appeal the Order of the United States District Court for the Western District of Oklahoma in Case No. CIV-82-1754-E, denying DIAMOND SHAMROCK's Motion for Judgment in Accordance with Motion for Directed Verdict and granting a new trial upon the Court's own motion, which Order was entered on April 18, 1985 and which Order was certified under 28 U.S.C. Section 1292(b), as shown by the true and correct copy of the Certified Interlocutory Order attached hereto as Exhibit "A". In support hereof, DIAMOND SHAMROCK shows the Court as follows:

1. Statement of Facts:

The action below was commenced on October 12, 1982 by DIAMOND SHAMROCK for recovery of money owed to it by Defendants ZINKE & TRUMBO, LTD., ROBERT M. ZINKE and DAVID B. TRUMBO ("ZINKE & TRUMBO") under the terms of a joint operating agreement covering the John Hamilton 1-33 Well located in Section 33-23N-26W, Ellis County, Oklahoma. ZINKE & TRUMBO denied liability because of alleged gross negligence on the part of DIAMOND SHAMROCK in completing the well. ZINKE & TRUMBO counterclaimed for damages which allegedly occurred to the well bore as a result of this alleged gross negligence. Certain royalty owners, JOHN HAMILTON, MARTHA FRANCIS and MORRIS RICHARDSON ("Counterclaimants") also joined in the counterclaim, seeking to recover against DIAMOND SHAMROCK for alleged negligence in the completion of the well. Counterclaimants HAMILTON and FRANCIS are lessors of oil and gas leases owned by DIAMOND SHAMROCK. HAMILTON and FRANCIS sought actual and punitive damages for DIAMOND SHAMROCK's alleged breach of implied covenants of their oil and gas leases to protect against drainage and to market production from the well.

The first jury trial of the case below began on October 27, 1983 and resulted in a verdict on November 2, 1983 in favor of DIAMOND SHAMROCK on its claim against ZINKE & TRUMBO and against HAMILTON and FRANCIS on their claim for failure to market. The jury found in favor of ZINKE & TRUMBO on its claim for gross negligence, in favor of all Counterclaimants on their claim for negligence, and in favor of Counterclaimants HAMILTON and FRANCIS for breach of implied covenant to protect against drainage. By its Order entered on January 11, 1984, the trial court granted DIAMOND SHAMROCK's Motion for New Trial in all respects.

A second jury trial began, on February 11, 1985 and, on February 19, 1985, the jury again returned a verdict in favor of DIAMOND SHAMROCK on its claim against ZINKE & TRUMBO for breach of the joint operating agreement in the amount of $220,830.34. By its verdict, the jury necessarily found that DIAMOND SHAMROCK had complied with the joint operating agreement and had conducted operations in a good and workmanlike manner. The jury therefore properly refused to return a verdict in favor of ZINKE & TRUMBO on its claim for alleged gross negligence or for Counterclaimants on their claim for alleged negligence. Accordingly, the Court has entered judgment on the above claims, as reflected in the true and correct copy of the Journal Entry of Judgment attached hereto as Exhibit"B".

It is DIAMOND SHAMROCK's position that the jury, by its verdict, also found against HAMILTON and FRANCIS on their claims for drainage and failure to market by failing to fill in the verdict form on those claims. Even if the jury had not found for DIAMOND SHAMROCK on those claims, DIAMOND SHAMROCK's Motion for Directed Verdict should have been sustained with regard to the issues of drainage and failure to market because HAMILTON and FRANCIS failed to prove the essential elements of these claims. Therefore, DIAMOND SHAMROCK filed a Motion for Judgment in Accordance with Motion for Directed Verdict which was denied by the trial court.

ZINKE & TRUMBO and Counterclaimants filed a Motion to reinstate the original verdict rendered in this case. In the alternative, they sought a new trial on Counterclaimants' causes of action for drainage and marketing. By its Order of April 18, 1985, the trial court denied the Motion for Reinstatement of the First Verdict, but the trial court also found that the jury failed to return a verdict with respect to HAMILTON and FRANCIS' claims for failure to market and drainage and therefore granted a new trial on its own motion.

The trial court certified its granting of a new trial and denial of DIAMOND SHAMROCK's Motion for Judgment in Accordance with Motion for Directed Verdict for appeal pursuant to 28 U.S.C.Section 1292(b), as shown by the Certified Interlocutory Order attached hereto as Exhibit "A".

At both trials, none of the individual Counterclaimants testified. The leases in question were not introduced into evidence. Although the Court specifically instructed the jury that demand was a necessary element of Counterclaimants' causes of action for drainage and failure to market, no evidence, either documentary or testimonial, was introduced to indicate that Counterclaimants had made demand on DIAMOND SHAMROCK to market production or to protect against drainage. No evidence was introduced to indicate that any of the individual Counterclaimants objected to DIAMOND SHAMROCK's action in shutting in the John Hamilton 1-33 Well to await a pipeline connection or its action in attempting to market production. There was also no evidence of drainage from Section 33 or the value and amount thereof. The evidence before the jury was that DIAMOND SHAMROCK complied with the implied covenant to protect against drainage by drilling the John Hamilton 1-33 Well. Further,there was no evidence or basis in law for submitting the issue of punitive damages to the jury. Counterclaimants failed to object to the verdict form at the time it was explained and at the time it was returned by the jury and the jury polled.

2. Statement of Controlling Questions of Law:

A. Whether the trial court, in its Order of April 18, 1985, erred in granting a new trial on its own motion where the jury filled in that portion of the general verdict form providing for a judgment in favor of DIAMOND SHAMROCK and left blank those portions of the general verdict form which would have allowed a verdict in favor of Defendants and Counterclaimants?

B. Whether the trial court, in its Order of April 18, 1985, erred in granting a new trial on its own motion when Defendants and Counterclaimants waived any objection to the verdict by failing to object both at the time the Court explained the verdict form to the jury and after the verdict was returned and the jury polled?

C. Whether the trial court erred in failing to grant DIAMOND SHAMROCK's Motion for Judgment when there was no evidence of the terms of the oil and gas leases in question and it was therefore impossible for the jury or the Court to determine whether DIAMOND SHAMROCK breached an express or implied obligation to protect against drainage or market, and where it was impossible for the Court or jury to determine whether the leases in question contained an express negation of any such covenants?

D. Whether the trial court erred in failing to grant DIAMOND SHAMROCK's Motion for Judgment when there was no evidence that Counterclaimants made demand upon DIAMOND SHAMROCK to protect against drainage or to market production as required by law and the instructions of the Court?

E. Whether the trial court erred in failing to grant DIAMOND SHAMROCK's Motion for Judgment when there was no evidence to support an award of punitive damages because there was no evidence that any breaches of the implied covenants to protect against drainage and to market production were actuated by oppression, fraud or malice as required by 23 O.S. Section 9 and, further, there was no evidence of actual damages?

F. Whether the trial court erred in granting a new trial on its own Motion when DIAMOND SHAMROCK's Motion for Judgment in Accordance with Motion for Directed Verdict should have been sustained?

3. Statement of the Reasons why a Substantial Basis Exists for a Difference of Opinion on the Controlling Questions of Law and Why an Immediate Appeal May Materially Advance the Termination of the Litigation:

There is a difference of opinion under the authorities as to the following issues, all of which are crucial to the trial and decision of this case: (a) whether under Oklahoma law demand is a prerequisite to an action for damages for breach of implied covenants of an oil and gas lease; (b) whether the failure of the jury to fill in portions of a general verdict form renders the verdict incomplete, and whether waiver applies for failure of a party to object to a such verdict prior to the discharge of the jury; and (c) whether, in an action for breach of implied covenants of an oil and gas lease, the oil and gas lease or its terms must be in evidence to show whether or not there is an express negation of such covenants. These questions (perhaps more precisely expressed in the Statement of Controlling Questions of Law contained herein) are crucial to the issues of the instant case. The correct resolution of these questions is at the core of the instant dispute, and a resolution of these questions may eliminate any need for an additional trial.

If the trial court has committed error in holding that the jury's verdict was not complete, then no additional trial proceedings will be necessary. Likewise, if Defendants and Counterclaimants are barred from asserting that the verdict is incomplete by their failure to object before discharge of the jury, then no additional trial will be necessary.

If demand for compliance with the implied covenants is a necessary element of proof or if proof of the terms of an oil and gas lease is necessary in order to recover on an action for alleged breach of the implied covenant, then no further trial proceedings will be necessary.

This matter has been pending for over two and one-half years and two lengthy jury trials have been held on the claims sought to be appealed herein, the Court having previously granted a Motion for New Trial after the first jury trial was held. Thus, an immediate appeal will expedite the ultimate termination of this litigation and prevent further protracted, expensive and perhaps unnecessary litigation.

The granting of an immediate appeal will resolve issues which are central to the core of this controversy. If any of the controlling questions of law set forth above are resolved in DIAMOND SHAMROCK's favor, subsequent trial proceedings and subsequent appeals will not be necessary.

If, on the other hand, an immediate appeal is not granted, a third trial will be necessary. An appeal will most certainly result from that trial, regardless of the prevailing party. That subsequent appeal, in resolving the controlling questions of law set forth above, might result in the necessity of a fourth trial and a possible subsequent appeal. Neither the litigants nor the trial or appellate courts should be required to submit to this lengthy process of litigation when an immediate appeal will resolve all of the controlling questions of law and may well foreclose all further proceedings.

The trial court has, pursuant to Rule 54, Fed. R. Civ. P., directed the entry of final judgment with respect to all other claims in this action. Defendants and Counterclaimants have indicated their intention to appeal the entry of that judgment. Thus, piecemeal appeals will be avoided by consideration of the controlling questions of law involved in the interlocutory orders. By so doing, all issues in this case can be raised in a single consolidated appeal. An immediate appeal would more efficiently dispose of this litigation under the circumstances of this case.

WHEREFORE, premises considered, DIAMOND SHAMROCK respectfully requests that this Court grant it permission to appeal the Certified Interlocutory Order attached hereto as Exhibit "A".

Respectfully submitted,

By: /s/ H.B. WATSON JR.
H.B. WATSON, JR.

By: /s/ RICHARD K. BOOKS
RICHARD K. BOOKS

OF COUNSEL:

WATSON & McKENZIE
1900 Liberty Tower
Oklahoma City, Oklahoma 73102
Telephone: (405)232-2501

Attorneys for Plaintiff,
Diamond Shamrock Corporation

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing PETITION FOR PERMISSION TO APPEAL was duly mailed with postage fully prepaid thereon to James U. White, Jr. and Gary Davis, Crowe & Dunlevy, P.C., 1800 Mid-America Tower, 20 North Broadway, Oklahoma City, Oklahoma 73102, Attorneys for Defendants and Counterclaimants, on this 26 day of April, 1985.

/s/ RICHARD K. BOOKS
Richard K. Books

SLT/26/sp

APPENDIX L

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 85-1698

DIAMOND SHAMROCK CORPORATION
a Delaware corporation,

Appellant,

v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and DAVID B. TRUMBO, an individual

Appellees,

and

MORRIS A. RICHARDSON, JOHN HAMILTON, and MARTHA FRANCIS

Appellees.

[FILED June 14, 1985]

DOCKETING STATEMENT

Pursuant to Rule 8 of the Rules of the United States Court of Appeals for the Tenth Circuit, Appellant, DIAMOND SHAMROCK CORPORATION (hereinafter referred to as "DIAMOND SHAMROCK"), hereby furnishes this docketing statement to assist the Court in making its calendar assignment, and shows this Court that:

I. Jurisdiction is conferred upon this Court to hear this appeal by virtue of 28 U.S.C. Section 1292(b).

II. This appeal is from a Certified Interlocutory Order entered by the United States District Court for the West-

ern District of Oklahoma on April 18, 1985, denying DIAMOND SHAMROCK's Motion for Judgment inAccordance with Motion for Directed Verdict and granting a new trial upon the Court's own motion, which Order was certified under 28 U.S.C. Section 1292(b).

III. The date of the Certified Interlocutory Order appealed hereby is April 18, 1985. The date of the Order denying DIAMOND SHAMROCK's Motion for Judgment in Accordance with Motion for Directed Verdict filed pursuant to Fed. R. Civ. P. 50(b) is April 18, 1985. The date of the Order denying Appellees' Motion to Partially Reinstate the Original Verdict and/or for New Trial filed pursuant to Fed. R. Civ. P. 59 is March 19, 1985.

DIAMOND SHAMROCK filed its Petition for Permission to Appeal in this case on April 29, 1985. That Petition for Permission to Appeal has been granted.

IV. Statement of this Case:

The action below was commenced on October 12, 1982 by DIAMOND SHAMROCK for recovery of money owed to it by Appellees, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE and DAVID B. TRUMBO (hereinafter referred to as "ZINKE & TRUMBO") under the terms of the Joint Operating Agreement covering the John Hamilton #1-33 Well located in Section 33-23N-26W, Ellis County, Oklahoma. DIAMOND SHAMROCK alleged that ZINKE & TRUMBO breached the Joint Operating Agreement by failing to pay their proportionate share of drilling and completion expenses for the John Hamilton #1-33 Well. ZINKE & TRUMBO denied liability because of alleged gross negligence on the part of DIAMOND SHAMROCK in completing the well. ZINKE & TRUMBO counterclaimed for damages which allegedly occurred to the wellbore as a result of this alleged gross negligence.

Certain royalty owners, JOHN HAMILTON, MARTHA FRANCIS and MORRIS RICHARDSON (hereinafter re-

ferred to as "Counterclaimants"), also joined in the counterclaim, seeking to recover against DIAMOND SHAMROCK for alleged negligence in the completion of the well. Counterclaimants HAMILTON and FRANCIS are lessors of oil and gas leases owned by DIAMOND SHAMROCK. HAMILTON and FRANCIS also sought actual and punitive damages for DIAMOND SHAMROCK's alleged breach of implied covenant of their oil and gas leases to protect against drainage and to market production from the well.

Two jury trials were held in this case. The first jury trial began on October 27, 1983 and resulted in a verdict on November 2, 1983 in favor of DIAMOND SHAMROCK on its claim against ZINKE & TRUMBO and against HAMILTON and FRANCIS on their claim for failure to market. The jury found in favor of ZINKE & TRUMBO on its claim for gross negligence, in favor of all Counterclaimants on their claim for negligence and in favor of Counterclaimants HAMILTON and FRANCIS for breach of implied covenant to protect against drainage. By its Order entered on January 11, 1984, the Trial Court granted DIAMOND SHAMROCK's Motion for New Trial in all respects, and denied DIAMOND SHAMROCK's Motion for Judgment Notwithstanding the Verdict.

A second jury trial began February 11, 1985, and on February 19, 1985, the jury again returned a verdict in favor of DIAMOND SHAMROCK on its claim against ZINKE & TRUMBO for breach of the Joint Operating Agreement in the amount of $220,830.34. By its verdict in the second trial, the jury necessarily found that DIAMOND SHAMROCK had complied with the Joint Operating Agreement and had conducted operations in a good and workmanlike manner. The jury therefore properly refused to return a verdict in favor of ZINKE & TRUMBO on its claim for alleged gross negligence or for Counterclaimants on their claim for alleged negligence. The Court

entered judgment on the negligence and gross negligence claims and certified that judgment for immediate appeal pursuant to Fed. R. Civ. P. 54(b).

It is DIAMOND SHAMROCK's position that the jury, by its verdict in the second trial, also found against HAMILTON and FRANCIS on their claims for drainage and failure to market by failing to fill in the verdict form on those claims. Even if the jury had not found for DIAMOND SHAMROCK on those claims, DIAMOND SHAMROCK's Motion for Directed Verdict should have been sustained with regard to the issues of drainage and failure to market because HAMILTON and FRANCIS failed to prove the essential elements of these claims. Therefore, DIAMOND SHAMROCK filed a Motion for Judgment in Accordance with Motion for Directed Verdict which was denied by the Trial Court by its Order of April 18, 1985.

ZINKE & TRUMBO and Counterclaimants filed a Motion to Reinstate the Original Verdict rendered in this case. In the alternative, they sought a new trial on Counterclaimants causes of action for drainage and failure to market. By its Order of March 19, 1985, the Trial Court denied the Motion for reinstatement of the first verdict and Counterclaimants' Motion for New Trial. By its Order of April 18, 1985, the Trial Court found that the jury failed to return a verdict with respect to HAMILTON and FRANCIS' claims for failure to market and drainage and therefore granted a new trial on its own motion.

The Trial Court certified its granting of a new trial and denial of DIAMOND SHAMROCK's Motion for Judgment in Accordance with Motion for Directed Verdict for appeal pursuant to 28 U.S.C. Section 1292(b). DIAMOND SHAMROCK's Petition for Permission to Appeal was therefore filed and granted.

None of the individual Counterclaimants testified, nor were the leases in question introduced into evidence in either trial. Although the Court specifically instructed the

jury that demand would be a necessary element of Counterclaimants' causes of action for drainage and failure to market, no evidence, either documentary or testimonial, was ever introduced to indicate that Counterclaimants had made demand on DIAMOND SHAMROCK to market production or to protect against drainage. No evidence was introduced to indicate that any of the individual Counterclaimants objected to DIAMOND SHAMROCK's action in shutting in the John Hamilton #1-33 Well to await a pipeline connection or its actions in attempting to market production. The undisputed evidence showed that ZINKE & TRUMBO was unable to find a market for its share of production from the well. There was also no evidence of drainage from Section 33 or the value and amount thereof. The evidence before the jury was that DIAMOND SHAMROCK complied with the implied covenant to protect against drainage by drilling the John Hamilton #1-33 Well. Further, there was no evidence or basis in law for submitting the issue of punitive damages to the jury. Counterclaimants failed to object to the verdict form at the time it was explained and at the time it was returned by the jury and the jury polled.

V. The questions presented by this appeal are as follows:

1. Whether the Trial Court erred in failing to grant DIAMOND SHAMROCK's Motion for Judgment when there was no evidence of the terms of the oil and gas leases in question and it was therefore impossible for the jury or the Court to determine whether DIAMOND SHAMROCK breached an expressed or implied obligation to protect against drainage or market, and where it was impossible for the Court or jury to determine whether the leases in question contain an express negation of any such covenant?

2. Whether the Trial Court erred in failing to grant DIAMOND SHAMROCK's Motion for Judgment when

there was no evidence that Counterclaimants made demand upon DIAMOND SHAMROCK to protect against drainage or to market production as required by law and the instructions of the Court?

3. Whether the Trial Court erred in granting a new trial on its own motion where the jury filled in that portion of the general verdict form providing for a judgment in favor of DIAMOND SHAMROCK and left blank those portions of the general verdict form which would have allowed a verdict in favor of ZINKE & TRUMBO and Counterclaimants?

4. Whether ZINKE & TRUMBO and Counterclaimants waived any objection to the verdict by failing to object both at the time this Court explained the verdict form to the jury and after the verdict was returned and the jury polled, and whether the Trial Court committed error in granting a new trial on its own motion under such circumstances?

5. Whether the Trial Court erred in failing to grant DIAMOND SHAMROCK's Motion for Judgment when there was no evidence to support an award of punitive damages because there was no evidence that any breaches of the implied covenants to protect against drainage and to market production were actuated by oppression, fraud or malice as required by 23 O.S. Section 9 and, further, where there was no evidence of actual damages?

6. Whether the Trial Court erred in submitting the issue of punitive damages to the jury with regard to Counterclaimants HAMILTON and FRANCIS' claim for breach of the implied covenant to market under 23 O.S. Section 9?

7. Whether the Trial Court erred in denying DIAMOND SHAMROCK's Motion for Judgment when there was no evidence to show that substantial drainage had occurred from Section 33, when the evidence showed that DIAMOND SHAMROCK complied with the covenant to protect

against drainage by drilling the John Hamilton #1-33 Well, and when there was no evidence of the amount of oil or gas alleged to have been drained or the value of the oil and gas during the period during which drainage was alleged to have occurred in Section 33?

8. Whether the Trial Court erred in denying DIAMOND SHAMROCK's Motion for Judgment where the evidence showed that DIAMOND SHAMROCK acted as a prudent operator in attempting to market the gas and where there was no basis upon which the jury could award damages for any failure to market?

9. Whether the Trial Court erred in granting a new trial on its own motion when DIAMOND SHAMROCK's Motion for Judgment should have been sustained?

10. Whether the Trial Court erred in failing to sustain DIAMOND SHAMROCK's Motion in Limine?

11. Whether the Trial Court committed error in failing to sustain DIAMOND SHAMROCK's Motions for Summary Judgment?

12. Whether the Trial Court committed error in admitting evidence which was properly not admissible, and in not admitting evidence which was properly admissible during the two trials of this case?

13. Whether the Trial Court committed error in giving those instructions objected to by DIAMOND SHAMROCK, and in failing to give those instructions requested by DIAMOND SHAMROCK but refused by the Court?

14. Whether, if the Trial Court erred in granting a new trial after the first jury trial, such error was harmless because DIAMOND SHAMROCK's Motion for Judgment Notwithstanding the Verdict should have been sustained after the first jury trial for the same reasons as those listed in paragraphs 1, 2, and 5 through 8 above?

VI. Oral argument should be granted in the instant appeal because this case involves complex factual and legal issues. The granting of oral argument will assist the Court in its decision by allowing counsel to address issues of concern to the Court. Further, the instant appeal involves issues which are of substantial importance to the oil and gas industry.

VII. This case does not involve prior appeals. ZINKE & TRUMBO and Counterclaimants have filed a cross-appeal from the Certified Interlocutory Order appealed hereby. ZINKE & TRUMBO and Counterclaimants filed an appeal from the judgment entered on the remaining, unrelated claims in this case which has been assigned Appeal No. 85-1653. DIAMOND SHAMROCK filed a cross-appeal to Appeal No. 85-1653, which has been assigned Appeal No. 85-1765.

VIII. There are no parties to the action below which are not revealed by the caption on appeal. Subsidiary or affiliated corporations to DIAMOND SHAMROCK are listed on Exhibit "B" attached hereto. There are no attorneys who have appeared for any other parties in the prior proceedings in the Trial Court who do not appear in this Appeal.

IX. Attached hereto is the Court's form Exhibit "A" to Docketing Statement, a copy of the docket sheet of the Trial Court as Exhibit "C", a copy of the Trial Court's Order of April 18, 1985 as Exhibit "D", a copy of the Petition for Permission to Appeal as Exhibit "E", and proof of service showing the names and addresses of the parties and counsel served in this proceeding.

Respectfully submitted,

By: /s/ SHARON L. TAYLOR
H.B. WATSON, JR.
RICHARD K. BOOKS

SHARON L. TAYLOR

OF COUNSEL:

WATSON & MCKENZIE
1900 Liberty Tower
Oklahoma City, OK 73102
Telephone: 405/232-2501

Attorneys for Appellees,
DIAMOND SHAMROCK CORPORATON

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing DOCKETING STATEMENT was duly mailed with postage fully prepaid thereon to James U. White, Jr., and Gary Davis, Crowe & Dunlevy, P.C., 1800Mid-America Tower, 20 North Broadway, Oklahoma City, Oklahoma 73102, Attorneys for Defendants and Counterclaimants, on this 4th day of June, 1985.

By: /s/ SHARON L. TAYLOR
SHARON L. TAYLOR

SLT:kaf:WB4

APPENDIX M

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

IN RE:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-82-1754-W

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Plaintiff,

v.

ZINKE & TRUMBO, LTD., a business association: ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individial,

Defendants,

and

MORRIS A. RICHARDSON, JOHN HAMILTON and MARTHA FRANCIS,

Counterclaimants.

[FILED April 29, 1985 in No. 85-1803]

PETITION FOR PERMISSION TO APPEAL

Counterclaimants' Petition for Permission to Appeal from the Interlocutory Order granting plaintiff's Motion for New Trial of January 11, 1984, and certified under 28 U.S.C. § 1292(b) on April 18, 1985. A copy of the Order appealed is attached as Exhibit "A". A copy of the Certification Order is attached as Exhibit "B".

There have already been two lengthy jury trials in this case. The Trial Court granted a Motion for New Trial on

all issues after the first trial, and has granted a Motion for New Trial on issues relating to these counterclaimants after the second trial. In addition to certifying the original grant of the Motion for New Trial after the first verdict for immediate appeal, the Trial Court has certified all issues finally resolved at the second trial for immediate appeal under Rule 54(b). (Certification attached as Exhibit "C"). Thus, if this Court grants permission to appeal pursuant to this petition, all issues will be reviewed on appeal at the same time. This will facilitate the eventual resolution of this case, and would avoid the possibility that yet a third trial and verdict would be affected by errors of law which would necessitate its reversal, leading to even a fourth trial.

The reason given by the District Court for granting a new trial was that the jury's verdict in favor of counterclaimants was irreconcilably inconsistent with the verdict in favor of plaintiff on its contract claim against defendant Zinke & Trumbo, Ltd. (Transcript attached as Exhibit "D"). However, the claims of petitioners against plaintiff are in no way related to plaintiff's contract claim against defendant Zinke & Trumbo, Ltd., a fact subsequently recognized by the Trial Court. (*See,* paragraph 1 on page 3 of Exhibit "C"). Yet, the District Court has refused to correct its error by reinstating the first verdict.

QUESTION OF LAW

Whether the Trial Court erred in holding that the first jury's verdict in favor of petitioners on their claim against plaintiff for drainage was irreconcilably inconsistent with the first jury's verdict in favor of plaintiff on its contract claim against defendant Zinke & Trumbo, Ltd.,and, therefore, whether the District Court improperly granted a new trial and thereby set aside the first jury's verdict in favor of petitioners on their claim for drainage.

The District Court, in its certification of the Interlocutory Order sought to be appealed herein (see Exhibit

"B" attached hereto) found that a substantial basis exists for a difference of opinion regarding the question which petitioners seek to have resolved by this appeal. Such basis for a difference of opinion is evidenced by the District Court's conflicting rulings on said question.

STATEMENT OF FACTS

Plaintiff and defendant Zinke & Trumbo, Ltd., both own leasehold interests under the Hamilton 1-33 well in Ellis County, Oklahoma, and entered into an Operating Agreement for its development. Counterclaimants own royalty interests in the well.

This lawsuit involves seven separate and distinct causes of action relating to the Hamilton well, to wit:

(1) Plaintiff's claim against defendant for breach of the Operating Agreement by failure to pay operating costs. The first jury returned a verdict for plaintiff in the amount of $212,805.60. After the District Court granted a new trial as to all claims involved in this action on the ground that the first jury's verdict was irreconcilably inconsistent, the second jury returned a verdict in favor of plaintiff on this claim in the amount of $220,830.34.

(2) Defendant's claim against plaintiff for damages for grossly negligent completion of the Hamilton well. The first jury returned a verdict for defendant in the amount of $995,196.00. The second jury returned a verdict on this claim as evidenced by the verdict form attached as Exhibit "E".

(3) Defendant's claim against plaintiff for damages for breach of a separate oral agreement governing mode of completion of the Hamilton well. The first jury returned a verdict in

favor of plaintiff on this claim. This claim was not submitted to the second jury due to the District Court's ruling on plaintiff's Motion in Limine.

(4) Defendant's claim against plaintiff for acceptance of kickbacks which wrongfully increased defendant's costs. This claim was not submitted to the first or second jury due to the District Court's ruling on plaintiff's Motions in Limine.

(5) Counterclaimants' claim against plaintiff for damages for negligent completion. The first jury returned a verdict for counterclaimants in the amount of $971,179.00. The second jury returned a verdict as evidenced by the verdict form attached as Exhibit "E".

(6) Counterclaimants' claim against plaintiff for breach of the implied covenant to protect against drainage. The first jury returned a verdict for counterclaimants in the amount of $32,499.00 actual damages and $1,000,000.00 punitive damages. The second jury returned a verdict on this claim as evidenced by the verdict form attached as Exhibit "E". The District Court has granted a third new trial on this claim.

(7) Counterclaimants' claim against plaintiff for damages for breach of the implied covenant to market. The first jury returned a verdict in favor of plaintiff. The second jury returned a verdict as evidenced by the verdict form attached as Exhibit "E". The District Court has granted a third new trial on this claim.

In conjunction with its grant of new trial on counterclaimants' claims for drainage and failure to market, the District Court, pursuant to 28 U.S.C. § 1292(b), certified

as immediately appealable certain previous Interlocutory Orders made by the District Court with respect to the claims upon which the District Court granted a new trial. Included in said Certified Interlocutory Orders is the Order sought to be appealed hereby, to wit, the Order of the District Court entered January 11, 1984, granting a new trial with respect to counterclaimants' claim for drainage. Also certified as immediately appealable was the District Court's Interlocutory Order denying plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and granting a new trial as to counterclaimants' claims against plaintiff for drainage and failure to market.

CONCLUSION

The District Court and all parties to this action agreed to certify the District Court's essential rulings to date on all claims involved in this action to avoid a piecemeal appeal and to resolve the questions of law involved in the District Court's Certified Interlocutory Orders prior to a lengthy and expensive third trial on such issues. A denial of this petition will frustrate the purpose of the District Court's certification. Further, an immediate appeal of the District Court's Order which petitioners seek to appeal herein will materially advance the termination of litigation in this action. A finding in petitioners' favor on appeal will be dispositive of the claims involved and will prevent the necessity of a third trial as to such claims. Accordingly, petitioners respectfully request permission to appeal the Interlocutory Order entered by the District Court on January 11, 1984, and certified on April 18, 1985.

Respectfully submitted,

/s/ JAMES U. WHITE JR.
Gary W. Davis
James U. White, Jr.
Richard C. Ford
L. Mark Walker

-Of the Firm-
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

ATTORNEYS FOR PETITIONERS

APPENDIX N

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Appeal No. 85-1803

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,
Plaintiff-Appellee,

v.

ZINKE & TRUMBO, LTD.,a business association; ROBERT M. ZINKE, individually; and DAVID B. TRUMBO, individually,
Defendants,

MORRIS A. RICHARDSON, JOHN HAMILTON and MARTHA FRANCIS,
Counterclaimants-Appellants.

[FILED June 10, 1985]

DOCKETING STATEMENT

Morris A. Richardson, John Hamilton and Martha Francis, Intervenors and Counterclaimants in Case No. CIV-82-1754-W, In the United States District Court for the Western District of Oklahoma, pursuant to Rule 8 of the Rules of this Court, make the following Docketing Statement:

1. The statutory authority which confers jurisdiction on this Court to hear this appeal is 28 U.S.C. §§ 1291 and 1292(b). Permission to appeal the Certified Interlocutory Order involved herein was given by this Court pursuant to Fed. R. App. P. 5 on May 15, 1985.

2. This appeal is from an Interlocutory Order of the United States District Court for the Western District of

Oklahoma which granted a new trial after the first trial of this case as to all claims involved.

3. The date of the Interlocutory Order appealed hereby is January 11, 1984. This Interlocutory Order was certified by the District Court under 28 U.S.C. § 1292(b) on April 18, 1985.

4. Statement of the Case:

The action below involved multiple claims among interest owners in the Hamilton 1-33 gas well located in Ellis County, Oklahoma. Plaintiff Diamond Shamrock is the operator and 3/4 working interest owner in the well. Defendant Zinke & Trumbo is 1/4 working interest owner. Morris A. Richardson, John Hamilton and Martha Francis are the royalty interest owners in the well.

The case was originally instituted when Diamond-Shamrock sued Zinke & Trumbo in contract for amounts alleged to be due under an Operating Agreement. Zinke & Trumbo counterclaimed in tort for gross negligence in operating the well, in contract for damages resulting from Diamond Shamrock's acceptance of kickbacks, and in contract for breach of a separate oral agreement governing the completion of the well. Richardson, Hamilton and Francis, ("Intervenors" hereinafter) were permitted to intervene to assert claims against Diamond Shamrock for negligent completion of the well and for breach of the implied covenants to protect against drainage and to market production.

This case has been tried twice. The first jury returned a verdict as follows: (1) in favor of Diamond Shamrock on its contract claim against Zinke & Trumbo; (2) in favor of Zinke & Trumbo on its tort claim against Diamond-Shamrock for gross negligence in the amount of $995,196.00; (3) in favor of Intervenors on their tort claim against Diamond Shamrock for negligence in the amount of $971,179.00; (4) in favor of Intervenors Hamilton and

Francis on their claim against Diamond Shamrock for breach of the implied covenant to protect against drainage in the amount of $32.499.00 actual damages and $1,000,000.00 punitive damages; and (5) against Intervenors Hamilton and Francis on their claim for breach of the implied covenant to market production.

On January 11, 1984, the District Court granted a new trial as to all claims involved in the first trial on the ground that the first jury's verdict was irreconcilably inconsistent. The grant of new trial ruled that the first jury's verdict in favor of Diamond Shamrock on its contract claim against Zinke & Trumbo was irreconcilably inconsistent with the first jury's verdict regarding Intervenors' claims against Diamond Shamrock for breach of the implied covenants to protect against drainage and to market production. It is the Order of the District Court granting new trial (as above-described) with regard to Intervenors' claims for drainage and failure to market which is being appealed herein.

The claims involved in this appeal were tried a second time and the second jury returned a verdict for Diamond Shamrock on its claim against Zinke Trumbo. However, the second jury did not fill out the portion of the verdict form covering (among others) Intervenors' claims for drainage and failure to market. Such inaction by the second jury was consistent with the District Court's extraneous comment during Instructions to the effect that if the second jury found for Diamond Shamrock on its contract claim against Zinke & Trumbo then "it's all over" such that the jury could disregard all other claims, including Intervenors' claims for drainage and failure to market.

After the second jury returned its verdict, the District Court, on its own motion, notified the parties that it intended to grant a new trial as to the claims of Intervenors for drainage and failure to market on the ground that the

Court's comment to the second jury (as above-described) was erroneous in that said claims of Intervenors are not inconsistent with Diamond Shamrock's contract claim against Zinke & Trumbo. Based on the District Court's admission that the claims of Intervenors for drainage and failure to market are not inconsistent with Diamond Shamrock's claim against Zinke & Trumbo, Intervenors moved the District Court to reinstate the first jury's verdict on their claims for drainage and failure to market.

The District Court refused to reinstate the original verdict as to Intervenors' claims against Diamond Shamrock for drainage and failure to market but instead granted a new trial, i.e. a third trial, as to said claims. Thus, the Order appealed herein, i.e. the January 18, 1984 Order of the District Court granting a new trial, remains an-Interlocutory Order insofar as Intervenors' claims for drainage and failure to market. The District Court certified such Interlocutory Order for immediate appeal pursuant to 28 U.S.C. § 1292(b) on April 18, 1985.

5. Question Presented by This Appeal:

Whether the District Court erred in granting a new trial after the first trial as to Intervenors' claims against Diamond Shamrock for breach of the implied covenants to protect against drainage and to market production. Alternatively stated, whether the first jury's verdict for Intervenors on their claims against Diamond Shamrock for breach of the implied covenants to protect against drainage and to market production was irreconcilably inconsistent with the first jury's verdict for Diamond Shamrock on its contract claim against Zinke & Trumbo.

6. Appellants request oral argument. Appellants believe that oral argument will assist the Court with regard to the complex factual issues involved in this case.

7. No prior appeals are involved in this case. There are three related appeals:. (1) Appeal No. 85-1653 and (2)

Appeal No. 85-1765, which are Appeal and Cross-Appeal, respectively, of the Order of the District Court entered April 18, 1985, certified as final pursuant to Fed. R. Civ. P. 54(b) and covering other claims involved in the case below; and (3) Appeal No. 85-1698 which is an appeal by Diamond Shamrock of an Interlocutory Order of the District Court entered April 18, 1985, certified pursuant to 28 U.S.C. § 1292(b), denying Diamond Shamrock's Motion for Judgment in Accordance with Motion for Directed Verdict and granting a new trial.

8. There are no parties to this litigation which are not revealed by the caption of this appeal. According to Diamond Shamrock's Docketing Statement filed in Appeal No. 85-1765 (Cross-Appeal to Appeal No. 85-1653), the names of all subsidiary and affiliated corporations to Diamond Shamrock are shown on Exhibit "A" attached hereto. There are no attorneys who appeared for any other parties in the prior proceedings in the District Court who do not appear in this appeal. Other than the proceedings in the District Court below, there are no proceedings which preceded this appeal.

9. Attached hereto are copies of the following documents:

(a) The Docket Sheet of the United States District Court for the Western District of Oklahoma from which the appeal is taken is attached hereto as Exhibit "B". The transcript necessary for this appeal is already on file in the District Court or has been ordered by Appellants in Appeal No. 85-1653.

(b) The Order of the District Court granting new trial, being the Order appealed herein, is attached hereto as Exhibit "C". Certification of said Order pursuant to 28 U.S.C § 1292(b) is attached hereto as Exhibit "D".

(c) The Order of this Court granting permission to appeal the Interlocutory Order appealed herein is attached hereto as Exhibit "E".

Respectfully submitted,

/s/ JAMES U. WHITE, JR.
Gary W. Davis
Richard C. Ford
James U. White, Jr.
L. Mark Walker

-Of the Firm-
CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405)245-7700

ATTORNEYS FOR DEFENDANTS/
COUNTERCLAIMANTS-APPELLANTS

MW13185

APPENDIX O

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Appeal No. 85-1653

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,
Plaintiff - Appellee.

v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; DAVID B. TRUMBO, an individual;
Defendants - Appellants,
MORRIS A. RICHARDSON; JOHN HAMILTON AND MARTHA FRANCIS,
Counterclaimants-Appellants

[FILED May 22, 1985]

DOCKETING STATEMENT

Appellants, Defendants and Counterclaimants in Case No. CIV-82-1754, In the United States District Court for the Western District of Oklahoma, pursuant to Rule 8 of the Rules of this Court, make the following docketing statement:

1. The statutory authority which confers jurisdiction on this Court to hear this appeal is 28 U.S.C. §1291. The judgment appealed determined fewer than all of the claims involved in this action, and was certified as final by the District Court pursuant to Fed. R. Civ. P. 54(b).

2. This appeal is from a Judgment of the United States District Court for the Western District of Oklahoma.

3. The date of the judgment appealed hereby is April 18, 1985. The Notice of Appeal was filed on May 1, 1985.

4. Statement of the Case:

The action below involved multiple claims among those owning interests in a gas well, known as the Hamilton 1-33 in Ellis County, Oklahoma. Diamond Shamrock was the operator and owner of 3/4 of the working interest. Zinke & Trumbo owned the remaining 1/4. Counterclaimants ("royalty owners") were the royalty owners.

The case started when Diamond Shamrock sued Zinke & Trumbo in contract for amounts alleged to be due under their operating agreement. Zinke & Trumbo counterclaimed in tort for gross negligence in operating the well, in contract for damages resulting from Diamond's acceptance of kickbacks, and in contract for breach of a separate oral agreement governing the completion of the well. Royalty owners were permitted to intervene to assert claims of negligence and breach of implied covenants against Diamond.

This case has already been tried twice. The first jury returned a verdict in favor of Diamond on its contract claim against Zinke & Trumbo, and in favor of Zinke & Trumbo, on its tort claim against Diamond for gross negligence in the amount of $995,196.00, and in favor of Royalty Owners against Diamond for negligence in the amount of $971,179.00. The District Court granted Diamond's Motion for New Trial on all claims on the ground that said verdict was irreconcilably inconsistent.

In both the first and second trials, the District Court excluded from the jury's consideration Zinke & Trumbo's claim against Diamond for acceptance of kickbacks. In the second trial, the District Court also excluded from the second jury's consideration Zinke & Trumbo's claim against Diamond for breach of the separate oral contract governing the mode of completion of the oil and gas well, which he had permitted in the first trial.

The second trial resulted in a verdict in favor of Diamond on its contract claim against Zinke & Trumbo. No verdict was reached on the other claims because the Court diverged from the prepared instructions and remarked to the second jury that a finding for Diamond on its contract claim made it unnecessary to consider the claims of Zinke & Trumbo and Royalty Owners. The Court, because of this remark, granted a new trial as to Royalty Owner's claims of breach of implied covenants but entered judgment based on the verdict on all remaining claims. That judgment was certified for immediate appeal under Rule 54(b).

5. Questions Presented by this Appeal:

(a) Whether the District Court erred in granting a new trial after the first trial on the ground that the verdict in favor of Diamond on its contract claim was irreconcilably inconsistent with the verdict in favor of Zinke & Trumbo and Royalty Owners on their tort claims.

(b) Whether the District Court erred in the first and second trial by excluding from the juries consideration the contract claim of Zinke & Trumbo for damages resulting from Diamond's acceptance of "kickbacks".

(c) Whether the District Court erred in the second trial by excluding from the second jury's consideration the claim of Zinke & Trumbo against Diamond for breach of the separate oral contract governing completion.

(d) Whether the District Court erred in telling the second jury that a finding for Diamond on its contract claim made it unnecessary to consider the tort claims of Zinke & Trumbo and Royalty Owners.

(e) Whether the verdict of the second jury was incomplete and, therefore, failed to resolve

the claims of Zinke & Trumbo and Royalty Owners against the Appellee.

6. Appellants request oral argument. This case involves complex factual issues, and involves questions not recently decided by this Court which are of substantial importance to the parties and to the oil and gas industry.

7. There are no prior appeals. There is a related appeal, Appeal No. 85-1698, which is an appeal by all parties of certain Interlocutory Orders by the District Court in this action.

8. There are no parties to this litigation which are not revealed by the caption of this appeal. Appellants are unaware of any parent or subsidiary corporations connected with Appellee. All attorneys who appeared below have entered an appearance in this appeal. Other than proceedings in the District Court below, there were no proceedings which preceded this appeal.

9. Attached hereto are copies of the following documents:

(a) The docket sheet of the United States District Court for the Western District of Oklahoma from which the appeal is taken is attached hereto as Exhibit "A".

(b) The Journal Entry of Judgment and Certification sought to be reviewed is attached hereto as Exhibit "B".

(c) Notice of Appeal filed by appellants with this Court on May 1, 1985, is attached hereto as Exhibit "C".

Respectfully submitted,

/s/ RICHARD C. FORD
Gary W. Davis
Richard C. Ford
James U. White, Jr.
L. Mark Walker

-Of the Firm-

CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405)235-7700

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 1985, a true and correct copy of the foregoing Docketing Statement was mailed, with postage thereon fully prepaid, to H.B. Watson and Richard K. Books, Watson & McKenzie, 1900 Liberty Tower, Oklahoma City, Oklahoma 73102.

/s/ RICHARD C. FORD

MW12785

APPENDIX P

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 85-1765

DIAMOND SHAMROCK CORPORATION
a Delaware corporation,

Appellant,

v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and DAVID B. TRUMBO, an individual

Appellees,

and

MORRIS A. RICHARDSON, JOHN HAMILTON, AND MARTHA FRANCIS

Appellees.

[FILED June 3, 1985]

DOCKETING STATEMENT

Pursuant to Rule 8 of the Rules of the United States Court of Appeals for the Tenth Circuit, Appellant, DIAMOND SHAMROCK CORPORATION (hereinafter referred to as "DIAMOND SHAMROCK"), hereby furnishes this docketing statement to assist the Court in making its calendar assignment, and would show this Court that:

I. Jurisdiction is conferred upon this Court to hear this appeal by virtue of 28 U.S.C. Section 1291 and Fed. R. Civ. P. 54(b).

II. This appeal is from the judgment entered below on April 18, 1985, which made final the Order entered by the

United States District Court for the Western District of Oklahoma on January 11, 1984, denying DIAMOND SHAMROCK's Motion for Judgment Notwithstanding the Verdict. The judgment determined fewer than all of the claims involved in this action, and was certified as final by the District Court pursuant to Fed. R. Civ. P. 54(b).

III. The date of the judgment appealed hereby is April 18, 1985, which made final the Order denying DIAMOND SHAMROCK's Motion for Judgment Notwithstanding the Verdict entered on January 11, 1984. The date of the Order denying Appellees' Motion to Partially Reinstate the Original Verdict and/or for New Trial filed pursuant to Fed. R. Civ. P. 59 is March 19, 1985. DIAMOND SHAMROCK filed its Notice of Appeal on May 14, 1985.

IV. Statement of this Case:

The action below was commenced on October 12, 1982 by DIAMOND SHAMROCK for recovery of money owed to it by Appellees, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE and DAVID B. TRUMBO (hereinafter referred to as "ZINKE & TRUMBO") under the terms of the Joint Operating Agreement covering the John Hamilton #1-33 Well located in Section 33-23N-26W, Ellis County, Oklahoma. DIAMOND SHAMROCK alleged that ZINKE & TRUMBO breached the Joint Operating Agreement by failing to pay their proportionate share of drilling and completion expenses for the John Hamilton #1-33 Well. ZINKE & TRUMBO denied liability because of alleged gross negligence on the part of DIAMOND SHAMROCK in completing the well. ZINKE & TRUMBO counterclaimed for damages which allegedly occurred to the wellbore as a result of this alleged gross negligence.

Certain royalty owners, JOHN HAMILTON, MARTHA FRANCIS and MORRIS RICHARDSON (hereinafter referred to as "Counterclamants"), also joined in the counterclaim, seeking to recover against DIAMOND SHAMROCK for alleged negligence in the completion of

the well. Counterclaimants HAMILTON and FRANCIS are lessors of oil and gas leases owned by DIAMOND SHAMROCK. HAMILTON and FRANCIS also sought actual and punitive damages for DIAMOND SHAMROCK's alleged breach of implied covenant of their oil and gas leases to protect against drainage and to market production from the well.

Two jury trials were held in this case. The first jury trial began on October 27, 1983 and resulted in a verdict on November 2, 1983 in favor of DIAMOND SHAMROCK on its claim for unpaid well costs, against ZINKE & TRUMBO on its claim for breach of a new agreement, and against HAMILTON and FRANCIS on their claim for failure to market. The jury found in favor of ZINKE & TRUMBO on its claim for gross negligence, in favor of all Counterclaimants on their claim for negligence and in favor of Counterclaimants HAMILTON and FRANCIS for breach of implied covenant to protect against drainage. By its Order entered on January 11, 1984, the Trial Court granted DIAMOND SHAMROCK's Motion for New Trial in all respects, and denied DIAMOND SHAMROCK's Motion for Judgment Notwithstanding the Verdict.

A second jury trial began February 11, 1985, and on February 19, 1985, the jury again returned a verdict in favor of DIAMOND SHAMROCK on its claim against ZINKE & TRUMBO for breach of the Joint Operating Agreement in the amount of $220,830.34. By its verdict, the jury necessarily found that DIAMOND SHAMROCK had complied with the Joint Operating Agreement and had conducted operations in a good and workmanlike manner. The jury therefore properly refused to return a verdict in favor of ZINKE & TRUMBO on its claim for alleged gross negligence or for Counterclamants on their claim for alleged gross negligence. The Court entered judgment on the above claim and certified that judgment for immediate appeal pursuant to Fed. R. Civ. P. 54(b).

It is DIAMOND SHAMROCK's position that the jury, by its verdict entered at the second jury trial, also found against HAMILTON and FRANCIS on their claims for drainage and failure to market by failing to fill in the verdict form on those claims. Even if the jury had not found for DIAMOND SHAMROCK on those claims, DIAMOND SHAMROCK's Motion for Directed Verdict should have been sustained with regard to the issues of drainage and failure to market because HAMILTON and FRANCIS failed to prove the essential elements of these claims. Therefore, DIAMOND SHAMROCK filed a Motion for Judgment in Accordance with Motion for Directed Verdict which was denied by the Trial Court by its Order of April 18, 1985.

ZINKE & TRUMBO and Counterclaimants filed a Motion to Reinstate the Original Verdict rendered in this case. In the alternative, they sought a new trial on all of their counterclaims. By its Order of March 19, 1985, the Trial Court denied the Motion for reinstatement of the first verdict and Counterclaimants' Motion for New Trial. By its Order of April 18, 1985, the Trial Court found that the jury failed to return a verdict with respect to HAMILTON and FRANCIS' claims for failure to market and drainage and therefore granted a new trial on its own motion.

The Trial Court certified its granting of a new trial and denial of DIAMOND SHAMROCK's Motion for Judgment in Accordance with Motion for Directed Verdict for appeal pursuant to 28 U.S.C. Section 1292(b).

It is DIAMOND SHAMROCK's position that even if the Trial Court erred in granting a new trial after the first jury trial, DIAMOND SHAMROCK's Motion for Judgment Notwithstanding the Verdict should have been sustained with regard to the claims for negligence and gross negligence. ZINKE & TRUMBO and Counterclaimants failed

to prove the essential elements of these claims and failed to prove damages or the amount thereof.

V. The questions presented by this appeal are as follows:

1. Whether Trial Court erred in denying DIAMOND SHAMROCK's Motion for Judgment Notwithstanding the Verdict where ZINKE & TRUMBO and Counterclaimants failed to prove the essential elements of their claims of gross negligence and negligence and where they failed to prove any resultant damages or the amount thereof?

2. Even if the Trial Court erred in granting a new trial after the first jury trial, is that error harmless in that the Trial Court should have sustained DIAMOND SHAMROCK's Motion for Judgment Notwithstanding the Verdict?

VI. This Appeal is a cross-appeal to Appeal No. 85-1653. Oral argument should be granted in this Appeal in conjunction with Appeal No. 85-1653 because complex legal and factual issues are involved along with an extensive record. The above appeals involve issues which are of substantial importance to the oil and gas industry and the granting of oral argument will assist the Court in its decision by allowing counsel to address issues of concern to the Court.

VII. This case does not involve prior appeals. It is a cross-appeal to Appeal No. 85-1653. Appellant has also filed a Petition for Permission to Appeal from the Trial Court's Certified Interlocutory Order with respect to the remaining unrelated claims, which has been assigned Appeal No. 85-1698. Appellees filed a cross-appeal from the Certified Interlocutory Order.

VIII. There are no parties to the action below which are not revealed by the caption on appeal. Subsidiary and affiliated corporations to DIAMOND SHAMROCK are listed as Exhibit "B" attached hereto. There are no

attorneys who have appeared for any other parties in the prior proceedings in the Trial Court who do not appear in this Appeal.

IX. Attached hereto is the Court's form Exhibit "A" to Docketing Statement, a copy of the docket sheet of the Trial Court as Exhibit "C", a copy of the Trial Court's Judgment of April 18, 1985 as Exhibit "D", a copy of the Notice of Appeal as Exhibit "E", and proof of service showing the names and addresses of the parties and counsel served in this proceeding.

Respectfully submitted,

By: /s/ SHARON L. TAYLOR
H. B. WATSON, JR
RICHARD K. BOOKS
SHARON L. TAYLOR

OF COUNSEL:

WATSON & McKENZIE
1900 Liberty Tower
Oklahoma City, OK 73102
Telephone: 405/232-2501

Attorneys for Appellees,
DIAMOND SHAMROCK CORPORATION

CERTFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing DOCKETING STATEMENT was duly mailed with postage fully prepaid thereon to James U. White, Jr., and Gary Davis, Crowe & Dunlevy, P.C., 1800 Mid-America Tower, 20 North Broadway, Oklahoma City, Oklahoma 73102, Attorneys for Defendants and Counterclaimants, on this 1st day of June, 1985.

By: /s/ SHARON L. TAYLOR
SHARON L. TAYLOR

SLT:kaf:WB4

Supreme Court, U.S.
FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-607

In The

Supreme Court of the United States

October Term, 1986

DIAMOND SHAMROCK CORPORATION,

Petitioner,

v.

JOHN HAMILTON, MARTHA FRANCIS, MORRIS A. RICHARDSON, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, and DAVID B. TRUMBO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD C. FORD
Counsel of Record
GARY W. DAVIS
JAMES U. WHITE, JR.
L. MARK WALKER
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Attorneys for Respondents

November, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

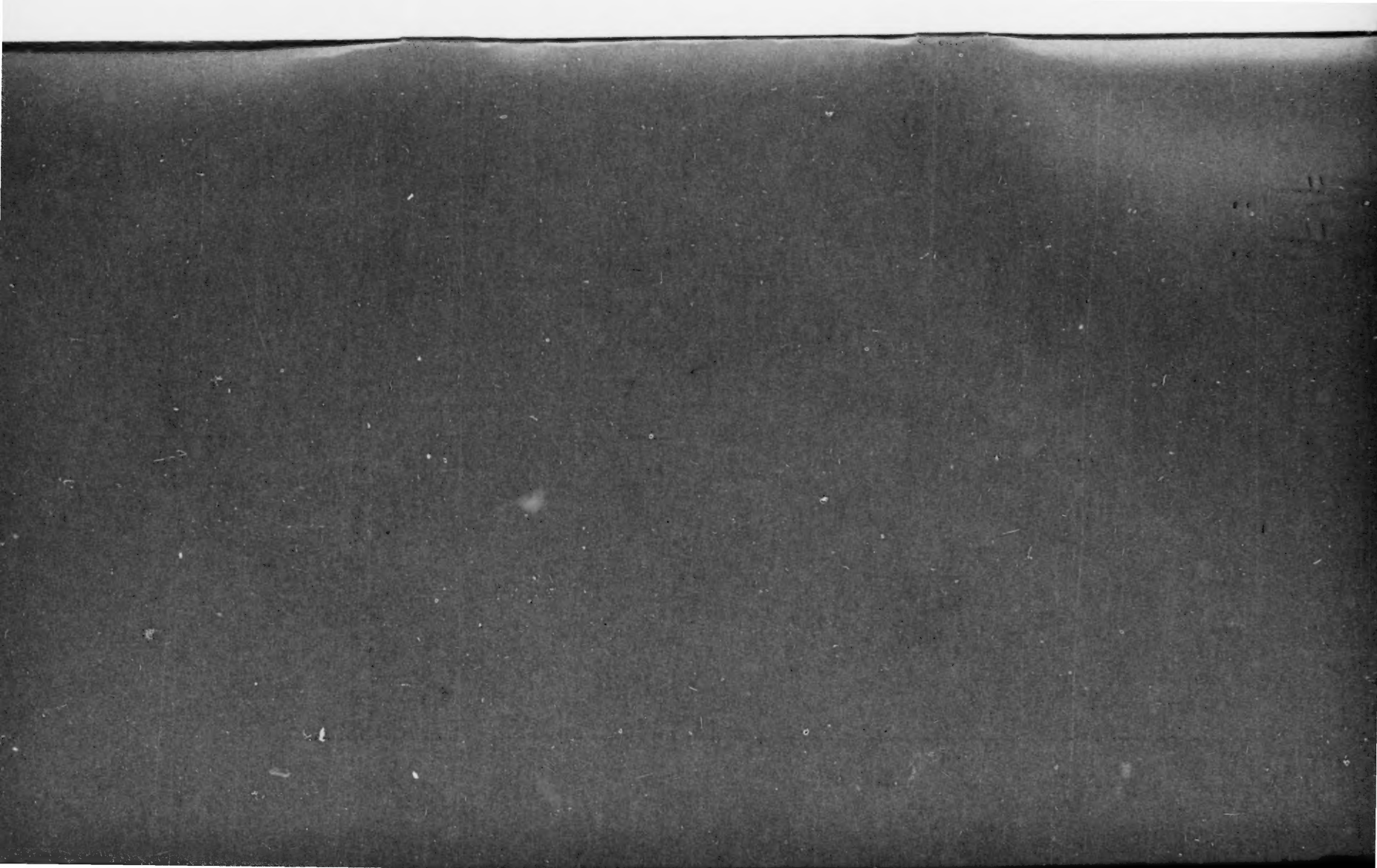

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING CERTIORARI	6
I. This Case Does Not Present A Conflict Among The Circuits	6
II. The Court Did Not Exceed Its Authority	7
III. The Court of Appeals' Decision Was Correct	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES:

Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658 (2d Cir. 1974) 8

Consolidated Express, Inc. v. New York Shipping Association, 602 F.2d 494 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980) 7, 8

Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) 8

Dyke v. Gulf Oil Corp., 601 F.2d 557 (TECA 1979) 8

Gallick v. Baltimore Ohio R.R., 372 U.S. 108 (1963) 7

Helene Curtis Industries v. Church & Dwight Co., 560 F.2d 1325 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070 8

Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. en banc 1974), *cert. denied*, 419 U.S. 885 8

In re Oil Spill by "Amoco Cadiz", 659 F.2d 789 (7th Cir. 1981) 8

UNITED STATES CODE:

28 U.S.C. § 1292(b) 7

OTHER SOURCES:

9 J.Moore, *Moore's Federal Practice* ¶ 110.25(1) (1985-86 Supplement p. 163) 8

STATEMENT OF THE CASE

Diamond's Petition rests almost entirely on two premises: that the Court of Appeals' decision was based on Diamond's waiver of its right to object to alleged inconsistencies of the jury verdict; and that the Court of Appeals decided issues beyond those properly before it. Neither premise is true. This Statement of the Case is submitted to set the record straight as to those two premises. No attempt has been made to set forth the detailed evidence that supported the jury's verdict and the Court of Appeals' decision; we respectfully refer the Court to the Opinion below (Pet. App. 1)[1] as to such matters.

Following the first trial of this case, the jury returned a verdict:

> 1) for plaintiff, Diamond Shamrock ("Diamond") against defendant Zinke & Trumbo, Ltd. for the balance of drilling and completion costs due under their Operating Agreement;
>
> 2) for Zinke & Trumbo against Diamond for gross negligence;
>
> 3) for royalty owners Morris Richardson (Zinke & Trumbo lease) and John Hamilton and Martha Francis (Diamond lease) against Diamond for negligence;
>
> 4) for John Hamilton and Martha Francis against Diamond for breach of implied covenant to prevent drainage.

Before the verdict was read, it was shown to counsel for all parties. Counsel were specifically invited to object to inconsistencies. (Pet. App. 6.) Counsel for Diamond, when asked if there was any reason the verdict should not be read

---

[1]References to materials included in Appendices to the Petition will be by "Pet. App." and the number of the page on which the material appears in those Appendices.

and recorded, answered "I can think of a lot of reasons, but none that are valid." (Pet. App. 7.)

The jury returned its verdict on a form submitted by the court which required a separate verdict for each separate claim and counterclaim. (The verdict form is reproduced in the Opinion of the court of appeals at Pet. App. 22-23.) The court's instructions did not tell the jury that petitioner's contract claim was inconsistent with the counterclaims against it. (Court Instruction No. 4 is included as Appendix A hereto.)

Nonetheless, after judgment was entered on the verdict, Judge Eubanks granted Diamond's Motion for New Trial on all claims, finding the verdicts to be inconsistent:

> "But that's going to be the order of this Court, and a new trial granted on all aspects of this case. The verdict of the jury vacated, set aside and held for naught as being so terribly inconsistent that this Court cannot in good conscience allow it to stand." (Tr. 1-5-84 at 42.)

At the second trial, the jury returned a verdict only for Diamond on its contract claim after receiving an ad lib instruction from Judge Eubanks that a finding for Diamond on that claim made it unnecessary to decide the remaining claims. (Pet. App. 8.) The Court subsequently ordered another new trial of the Hamilton and Francis claims for breach of implied covenants on its own motion, because of that instruction. At the same time, the Court denied Diamond's Motion for Judgment in Accordance with Motion for Directed Verdict and certified its action on that motion and *both* its new trial orders for interlocutory appeal. The Court of Appeals accepted the appeal. (*Id.*)

Diamond's description of the Certified Interlocutory Order incorrectly suggests that the trial court certified only

the issues relating to the partial new trial granted after the second trial:

> "The trial court certified its interlocutory order granting a new trial on its own motion on Hamilton and Francis' counterclaims for breach of the implied covenants (Paragraphs 1 and 2 above) for immediate appeal pursuant to 28 U.S.C. § 1292(b). App.B. That certified interlocutory order is the subject of the appeal below and of this Petition."

Petition p. 10, ¶ 1.

> "The trial court also certified its judgment on all other claims (Paragraphs 3 through 5 above) as final pursuant to Fed. R. Civ. P. 54(b). App. C. The final judgment on the claims described in Paragraphs 3 through 5 above is the subject of a separate appeal which is still pending before the Tenth Circuit."

Petition p. 10 ¶2. The Order itself unambiguously certifies the first new trial order, as well:

> "6. The denial of Plaintiffs' Motion for Judgment in Accordance with Motion for Directed Verdict, the granting of a new trial upon the Court's own Motion *and the granting of Plaintiff's Motion for New Trial on January 11, 1984 involve controlling questions of law as to which there are substantial grounds for differences of opinion.*

* * *

CERTIFICATION

I hereby certify that the issues disposed of by this Order denying Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and granting a new trial upon the claims of Counterclaimants JOHN HAMILTON and MARTHA FRANCIS for breaches of the implied covenants to protect against drainage and to market, *and by the Order entered on January 11, 1984 granting Plaintiff's Motion for New trial, involve controlling questions of law as to which*

> *there are substantial grounds for differences of opinion and that an immediate appeal from these Orders may materially advance the ultimate termination of this litigation.*" (Emphasis supplied.) (Pet. App. 36-39.)

Petitioner made this same erroneous claim in the Court of Appeals, and respondents quoted the order in response (Response to Petition for Rehearing dated June 30, 1986 attached as Appendix C hereto).

The trial court also certified its judgment on all other issues under Rule 54(b), Federal Rules of Civil Procedure, and all parties appealed.

For reasons unrelated to this Petition, the certified interlocutory appeal was briefed, argued and decided before the 54(b) appeal. No party sought consolidation of the two appeals or delay of the decision here under review. On May 21, 1986, the court below unanimously reversed the trial court's order setting aside the first verdict and remanded with instructions to reinstate the verdict and enter judgment on it. [Pet. App. 21, (Judge Barrett); Pet. App. 34. (Judge McKay); Pet. App. 35, (Judge Tacha).] All three judges concluded that the verdict was not legally inconsistent. [Pet. App. 16-20 (Judge Barrett); Pet. App. 33 (Judge McKay); Pet. App. 35 (Judge Tacha).]

Contrary to petitioner's argument, the decision below was not based on a holding that petitioner waived its right to object to the verdict by its failure to do so before the jury was discharged. Although Judge Barrett reached that conclusion (Pet. App. 20, 21), Judge McKay disagreed (Pet. App. 32-33), and Judge Tacha expressly declined to reach the question (Pet. App. 35). Judge McKay wrote:

> "McKay, Circuit Judge, concurring in part and dissenting in part:
>
> I concur in the result reached by the majority and in the court's conclusion that it is possible to reconcile the apparent inconsistencies in the verdicts returned at the first trial. I have serious misgivings, however, about the majority's reliance on Rule 49(b) of the Federal Rules of Civil Procedure. In my view, Rule 49 does not apply in this case. I therefore dissent from the court's holding that Diamond Shamrock waived its right to object to inconsistencies in the verdicts by failing to object or move for resubmission before the jury was dismissed."

Judge Tacha wrote:

> "I concur only in the portion of the court's opinion that finds that the verdicts in the first trial were not inconsistent and therefore should be reinstated. I think it is unnecessary to reach the Rule 49 question and therefore decline to express an opinion on that issue."

Like its misdescription of the trial court's certification order, petitioner's misdescription of the Court of Appeals' decision was urged in that court and the error explicitly pointed out. (Response to Petition for Rehearing dated June 30, 1986.)

Petitioner sought rehearing, raising all the issues presented here. Rehearing was denied July 16, 1986. (Pet. App. 54) The mandate of the court below is stayed pending disposition of this petition.

The circuit decided the 54(b) appeal on October 21, 1986. Insofar as relevant here, it followed the decision of the first panel as law of the case. A copy of the decision is attached as Appendix B, hereto.

REASONS FOR DENYING CERTIORARI

I. This Case Does Not Present A Conflict Among The Circuits

Diamond's primary claim of a conflict between the circuits is premised on its argument that the court below held that Diamond waived its right to object to the jury's verdict by failing to do so before the jury was discharged. (Pet. beginning at 14.) As pointed out above, the court did not so hold. Instead, the panel unanimously reversed the trial court on the basis that the verdict in this case was not, on the particular facts presented, legally inconsistent. (Pet. App. 16-20, 33, 35.) The panel assigned to the companion appeal below, construes the original decision as we do. (See App. B hereto.)

Petitioner's argument, that a conflict between the circuits exists because the circuit, in this case, failed to give adequate deference to the trial court's discretion, is frivolous. The court of appeals, based on a detailed consideration of the record, found that the verdict was not inconsistent under the instructions given (Pet. App. 19) and that the supposed inconsistency reflected the jury's adoption of Diamond's own trial theory. (*Id.*) The court concluded that the verdict was not inconsistent on its face, repugnant or in irreconcilable conflict:

> "Thus, the claimed inconsistency is between verdicts resolving entirely separate and distinct causes of action. The verdicts on the counterclaims were not required to be consistent with the verdict on Diamond Shamrock's breach of contract claim because the parties and the court submitted the respective claims to the jury for separate, distinct consideration. Thus, there was no inconsistency on the face of the general verdict. The verdicts are not repugnant or in irrecon-

> cilable conflict. This trial involved separate causes of action and the relationship of the parties was not legally identical with regard to each cause of action."

(Pet. App. 20.)

There simply is no case suggesting that any circuit would have deferred to a trial court under similar circumstances. Thus, this claim of conflict among the circuits is really nothing more than a claim that the court of appeals erred in determining the facts of this case.

Moreover, the trial court did not have discretion to set aside a verdict merely because he saw a possible inconsistency. Rather, as the court below held, the trial court had the duty to harmonize the verdicts if it was fairly possible to do so. *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108 (1963).

II. The Court Did Not Exceed Its Authority

There can be no question that the trial court certified all issues relating to his order granting a new trial under 28 U.S.C. § 1292(b). (Pet. App. 36, 39.) The Court of Appeals has jurisdiction to conduct such review in appeals under § 1292(b) as may be necessary to determine the validity of the order certified; it is not limited to the issue framed by the trial court or the parties. In *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494, 502 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980), both parties filed motions to strike portions of their opponents' briefs as being outside the scope of the issues certified. In denying the motions, the court stated:

> "An appeal pursuant to § 1292(b), like any other, is taken from the order of the district court, not from its opinion, and the court is "called upon not to answer the question certified but to decide an appeal."

Accord, Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. en banc 1974), *cert. denied*, 419 U.S. 885; *Dyke v. Gulf Oil Corp.*, 601 F.2d 557 (TECA 1979); *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974). *In Re: Oil Spill by "Amoco Cadiz,"* 659 F.2d 789, 793 (7th Cir. 1981); *Helene Curtis Industries v. Church & Dwight Co.*, 560 F.2d 1325, 1335 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070, 9 J. Moore, *Moore's Federal Practice* ¶110.25(1) (1985-86 Supplement p. 163). In the analogous situation of an interlocutory appeal from an order granting or denying a preliminary injunction, this Court held that acceptance of an interlocutory appeal authorized the court to consider any issue pertinent to the validity of the order appealed from. *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940).

Respondents argued all issues related to the new trial order of January 11, 1984 in their brief in chief. Diamond responded by conceding that there was no inconsistency insofar as the breach of implied covenant to prevent drainage was concerned and by contending that the issue of inconsistency as it related to negligence and gross negligence claims was not before the court. Thus, Diamond took the position that the court could consider the validity of part, but not all, of the January 11, 1984 new trial order. (Appellants' Reply Brief pp. 3-4.) Yet, Diamond made no attempt to obtain a ruling from the court as to the scope of the issues presented, and, indeed, declined to ask the panel to delay this appeal so it could be consolidated with the companion case despite being invited to do so.

Petitioner could have responded to those arguments on their merits, but chose not to do so. Petitioner could have sought a ruling from the court as to the scope of

issues to be considered, as the parties did in *Consolidated Express, infra,* but chose not to do so. Petitioner could have sought consolidation of the two appeals, but chose not to do so.[2] In short, petitioner chose its own destiny, for whatever reasons it deemed sufficient, and should not be heard to complain now.

III. The Court Of Appeals' Decision Was Correct

The truth is that the trial court committed clear error in setting aside the first verdict and that the court of appeals was amply justified in reinstating it. Perhaps the trial court was deceived, by Diamond's constant claim that the contract award necessarily included a finding of good and workmanlike performance, into believing that he had so instructed the jury. Regardless, he unquestionably was operating under some misconception because he set aside, as inconsistent, verdicts on the implied covenant claims which not even Diamond believes are inconsistent. (Pet. 24.)

Perhaps recognizing the impossibility of fairly defending the trial court, petitioner suggests that the trial court did not really set the original verdict aside solely for inconsistency but instead intended to grant the new trial on some other ground. (Pet. p.25.) Petitioner does not now say what that other ground was (Pet. p.25) and has apparently abandoned its argument below that the trial court intended to grant the new trial on all eighteen grounds argued in its motion for new trial. (Appellants'

---

[2]Prior to oral argument in this case, the court invited counsel to comment on whether argument should be delayed until the other appeal caught up. No objection to proceeding was made.

Reply Brief p.20.) There is no room for a contention that the new trial was based on anything but inconsistency of the verdict. The trial judge repeatedly said so, and Diamond has never found any indication in the record that supports the presence of any other basis for his action. The trial judge's comments are utterly unambiguous:

> "[T]his is an inconsistency that we just absolutely cannot live with." (Tr. 1-5-84; R. Vol. XI at 41.)
>
> "I just think in my own mind that the verdict is so inconsistent with respect to the findings on all of the claims that I have just got to set it aside and start over." (*Id.* at 42.)
>
> "But that's going to be the order of the Court, and a new trial granted on all aspects of this case. The verdict of the jury vacated, set aside and held for naught as being so terribly inconsistent that this Court cannot in good [conscience] allow it to stand." (*Id.* at 42.)

Finally, petitioner has sprinkled numerous one line complaints about either the decision below or the sufficiency of the evidence to support the original verdict. These have nothing to do with the issues raised by the Petition, have all been considered and rejected on their merits below, and merely serve to underline that this Petition presents no substantial issues for review. It is simply an attempt to get this Court to redo the detailed review of the trial court action, on the particular facts, that the court of appeals was supposed to perform, and did.

———o———

CONCLUSION

Petitioner has failed to demonstrate any need for review by this Court. The court of appeals did its job thoroughly and correctly, and the Petition ought to be denied.

Respectfully submitted,

RICHARD C. FORD
Counsel of Record
GARY W. DAVIS
JAMES U. WHITE, JR.
L. MARK WALKER
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Attorneys for Respondents

APPENDIX A

INSTRUCTION NO. 4

PLAINTIFF'S CLAIM

The plaintiff's sole cause of action is against the defendants, Zinke & Trumbo, Ltd., Robert M. Zinke and David B. Trumbo, for breach of contract. In order to prevail upon this claim, the plaintiff must establish all of the following elements by a preponderance of the evidence.

1. That the defendant, Zinke & Trumbo, Ltd., elected to participate in the completion of the well; and

2. That the plaintiff, Diamond Shamrock Corporation, has substantially performed its duties under the terms and conditions of the operating agreement.

With regard to the first element, you are instructed that the adequacy of the election must be determined pursuant to the terms of the operating agreement. You will be subsequently instructed on contract interpretation.

You are instructed that substantial performance means performance of the essential elements of the contract.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 85-1653
& 85-1765

(D.C. No. 82-1754-E)
(W.D. Okla.)

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Plaintiff-Appellee
Cross-Appellant,

v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and DAVID B. TRUMBO, an individual,

Defendants-Appellants
Cross-Appellees,

MORRIS A. RICHARDSON; JOHN HAMILTON; MARTHA N. FRANCIS,

Counterclaimants-Appellants
Cross-Appellees.

ORDER AND JUDGMENT
(Filed October 21, 1986)

Before BARRETT and BALDOCK, Circuit Judges, and CONWAY, District Judge.*

*The Honorable John E. Conway, United States District Judge for the District of New Mexico, sitting by designation.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that

oral argument would not be of material assistance in the determination of this appeal and cross-appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

These are an appeal and cross-appeal from a district court order entered after the second trial of the parties' claims. The facts are set out in detail in this court's earlier opinion, Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416 (10th Cir. 1986), but an overview is necessary for an understanding of the issues now before the court.

Plaintiff and defendants agreed to jointly develop the Hamilton Well on Section 33, a 640-acre tract of land in Oklahoma. They signed a contract under which defendants agreed to reimburse plaintiff for one-fourth of the development costs. Counterclaimants, who were the owners of the mineral estate underlying Section 33, were not parties to the contract.

When defendants refused to pay plaintiff the full amount which plaintiff thought was required by the contract, plaintiff sued defendants for breach of contract. Defendants denied liability and filed a counterclaim against plaintiff for gross negligence and breach of a new contract. Counterclaimants joined the suit, seeking damages from plaintiff for negligence. John Hamilton and Martha N. Francis, the two counterclaimants who owned the mineral interests underlying the land leased by plaintiff, also counterclaimed for breaches of implied covenants that plaintiff would market the gas and protect against drainage.

All of these claims were tried to a jury for the first time in 1983. The jury returned the following verdict: (1) for plaintiff against defendants on plaintiff's claim for breach of contract, (2) for defendants against plaintiff on defendants' claim for gross negligence, (3) for plaintiff against defendants on defendants' claim for breach of a new agreement, (4) for counterclaimants against plaintiff on counterclaimants' claim for negligence, and (5) for Hamilton and Francis on their claim that plaintiff had breached an implied covenant to protect against drainage, but against them on their claim that plaintiff had breached an implied covenant to market.

After the trial, plaintiff moved for judgment notwithstanding the verdict or for a new trial. It argued that the jury's finding that defendants had breached the contract was irreconcilably inconsistent with the jury's findings that plaintiff had been negligent and grossly negligent. On January 11, 1984, the district judge entered an order denying plaintiff's motion for judgment notwithstanding the verdict and granting plaintiff's motion for new trial. We will refer to this order as the first new trial order.

The same claims were tried to a second jury in 1985. That jury found for plaintiff on its claim that defendants had breached the contract, but did not fill in any of the remaining blanks on the verdict form. On April 18, 1985, the district court entered a "Journal Entry of Judgment," which certified the following verdict as final pursuant to Fed. R. Civ. P. 54(b): for plaintiff on its claim that defendants had breached the contract, against defendants on all of their counterclaims, and against counterclaim-

ants on their negligence claim. The appeal and cross-appeal now before this court, Nos. 85-1653 and 85-1765, are from this Rule 54(b) judgment.

On April 18, 1985, the district judge also issued a certified interlocutory order that (1) denied plaintiff's motion for judgment in accordance with its motion for directed verdict, (2) on the court's own motion, ordered a new trial with respect to John Hamilton's and Martha N. Francis' claims that plaintiff had breached two implied covenants, and (3) certified this interlocutory order *and* the first new trial order for immediate appeal pursuant to 28 U.S.C. § 1292(b). The appeal and cross-appeal from this certified interlocutory order have already been decided by this court. *See* Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416 (10th Cir. 1986). There, this court held that the jury verdict at the first trial had been consistent, so a new trial should not have been granted. Accordingly, the judgment of the district court was reversed and the matter was remanded with instructions to reinstate the first jury verdict.

In the appeal and cross-appeal now before the court, plaintiff argues that (1) the correctness of the first new trial order is now properly before the court for the first time; (2) the first new trial order was correct; and (3) if it was not correct, any error was harmless because plaintiff's alternative motion for judgment notwithstanding the verdict after the first trial should have been granted. We disagree with each of these arguments, as explained below.

In the order appealed from in the prior appeal and cross-appeal, the district judge had explicitly certified the first new trial order for immediate appeal. Accordingly,

the question of whether the district court had erred by entering the first new trial order was properly before this court in the prior appeal and cross-appeal. We reject plaintiff's first argument.

This court's prior opinion was proper and is binding on us as the law of the case. In that opinion, this court determined that the first jury verdict was consistent and that, as a result, new trial should not have been granted. We reject plaintiff's second argument for this reason.

Therefore, the only remaining controversy in the appeal and cross-appeal now before us is whether plaintiff is correct that the first new trial order was harmless error. This argument is based on the premise that the district could should have granted plaintiff's motion for judgment notwithstanding the verdict after the first trial. To obtain appellate relief on this ground, plaintiff would first have to show that, viewing the evidence in the light most favorable to defendants and counterclaimants, there was no evidence upon which the first jury's verdict could properly have been based. *See* Mackey v. Burke, 751 F.2d 322, 325 (10th Cir. 1984); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2524.

Having reviewed the record on appeal we conclude that plaintiff failed to satisfy this test. The transcript of the first trial shows that the testimony of at least three witnesses, Mr. Barry. Professor Blick, and Mr. Kelly, supported the jury's finding that plaintiff had been negligent with respect to counterclaimants and grossly negligent with respect to defendants. The transcript also shows that Mr. Barry presented evidence upon which the jury could properly have based the damage awards.

We agree with defendants and counterclaimants that, since this court has ordered the verdict of the jury at the first trial to be reinstated, their claim that the district court erroneously excluded evidence from the second trial is moot. As a result, we express no opinion on the merits of that claim.

The judgment of the United States District Court for the Western District of Oklahoma is REVERSED and the case is REMANDED with instructions that the district court reinstate the general verdict of the jury at the first trial and enter judgment thereon.

The mandate shall issue forthwith.

/s/ ROBERT L. HOECKER, Clerk

APPENDIX C

No. 85-1698

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

Appellant,

v.

ZINKE & TRUMBO, LTD.,
a business association

and

MORRIS A. RICHARDSON, JOHN HAMILTON and MARTHA FRANCIS
Cross-Appellants
and Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-82-1754-E

HONORABLE LUTHER B. EUBANKS, DISTRICT JUDGE

RESPONSE TO PETITION FOR REHEARING

(Filed June 30, 1986)

Gary W. Davis
Richard C. Ford
James U. White, Jr.
L. Mark Walker
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

ATTORNEYS FOR CROSS-APPELLANTS AND APPELLEES

June 1986

Diamond's Petition for Rehearing is based on a rehash of arguments previously made, and on a mischaracterization of the Court's decision which is advanced as an inconsistency with prior decisions of the Court. Neither provides a substantial basis for granting rehearing.

STATEMENT OF THE CASE

Following the first trial of this case, the jury returned a verdict:

> 1) for plaintiff, Diamond Shamrock ("Diamond") against defendant Zinke & Trumbo, Ltd. for the balance of drilling and completion costs due under their Operating Agreement;
>
> 2) for Zinke & Trumbo against Diamond for gross negligence;
>
> 3) for royalty owners Morris Richardson (Zinke & Trumbo lease) and John Hamilton and Martha Francis (Diamond lease) against Diamond for negligence;
>
> 4) for John Hamilton and Martha Francis against Diamond for breach of implied covenant to prevent drainage.

Before the verdict was read, it was shown to counsel for all parties. Counsel were specifically invited to object to inconsistencies. (Tr. 11-1-83 at 46.) Counsel for Diamond, asked if there was any reason the verdict should not be read and recorded, answered "I can think of a lot of reasons, but none that are valid." (Id.)

Nonetheless, after judgment was entered on the verdict, Judge Eubanks granted Diamond's Motion for New Trial on all claims, finding the verdicts to be inconsistent:

> "But that's going to be the order of this Court, and a new trial granted on all aspects of this case. The verdict of the jury vacated, set aside and held for naught as being so terribly inconsistent that this Court cannot in good conscience allow it to stand." (Tr. 1-5-84 at 42.)

At the second trial, the jury returned a verdict only for Diamond on its contract claim after receiving an ad lib instruction from Judge Eubanks that a finding for Diamond on that claim made it unnecessary to decide the remaining claims. (85 TR Vol V p. 1138.) The Court subsequently ordered a new trial on its own motion, because of that instruction, of the Hamilton and Francis claims for breach of implied covenants. At the same time, the court denied Diamond's Motion for Judgment in accordance with Motion for Directed Verdict and certified its action on that motion and both its new trial orders for interlocutory appeal.[1] This Court accepted appeals on all issues certified. Pursuant to Rule 28(b), Diamond as plaintiff below is deemed the appellant.

The trial court also certified its judgment on all other issues under Rule 54(b), Federal Rules of Civil Procedure and appeal from that judgment is pending in this Court under case number 85-1765.

The Case was argued on January 28, 1986, and decided on May 21, 1986. The Court unanimously concluded that the trial court erred in setting aside the original jury verdict and remanded the case with instructions to reinstate that verdict and enter judgment on it.

---

[1]Despite Diamond's suggestion to the contrary, the trial court did not limit its certification to any particular issues involved in the new trial orders. (Copy attached hereto).

I. The court's decision was not based on a holding that Diamond waived its right to object to inconsistencies.

Diamond devotes a large part of its argument for rehearing to the question of whether it waived its right to object to the first verdict for inconsistency by failing to do so before the jury was discharged (Pet. ¶ 3, 4, 6, 7).

Judge Barrett's opinion concludes, and we believe properly, that Diamond's failure to object to the original verdict before the jury was discharged despite being expressly invited to do so, waived its right to do so later (p. 18). Judge McKay (p. 12) disagreed. Judge Tacha expressly declined to decide that issue as being unnecessary to decision of the case. Thus, the Court had no majority decision on this point. Nonetheless, Diamond's Petition for Rehearing asserts that the Court held that it waived its rights and asserts that such holding was inconsistent with prior decisions (Pet. at ¶ 3). Since there was in fact no majority holding on this issue, there is no reason to address whether it would have been inconsistent with prior decisions or not. In truth, no prior decision of this Court has resolved the precise issue involved.

II. Demand is not a prerequisite to a damage action for breach of implied covenants.

There is no Oklahoma decision that holds, or that can fairly be read as suggesting, that demand is a prerequisite to a pure damage action for breach of the implied covenant to prevent drainage. Every case cited by Diamond as supporting the existence of a demand requirement involved a claim for forfeiture of the lessee's interest.

More importantly, a demand requirement in a damage action makes no sense particularly where, as here, it was the lessee itself that drilled the robber well. This is best illustrated by focusing, as the Court did in oral argument, on drainage that takes place before demand is made. If demand is required, and made, does the royalty owner have the right to recover damages suffered prior to demand, or not? If he does, the demand requirement is a meaningless formality. If pre-demand damages are denied, the law has given the lessee a license to steal as long as he quits when he gets caught. There is no reason to believe that Oklahoma would adopt a demand requirement that would of necessity be either a useless formality or an immunization of wrongful conduct predating demand.

Moreover, at least two Oklahoma cases have awarded damages for breach of implied covenants without mentioning any demand requirement. *North American Petroleum Co. v. Knight,* 321 P.2d 964 (Okla. 1958); *Junction Oil & Gas Co. v. Pratt,* 99 Okla. 14, 225 P. 717 (1924), and both Professor Merrill and Professor Hemingway have concluded that demand is not, and should not be, required in a demand action.

> "First impression suggests that there should be no difference in the treatment of cases invoking the two remedies. Reflection calls to mind that there are distinctions between the two which may justify divergent treatment. Forfeiture is a harsh remedy which wipes out the lessee's interest. Damages are drawn merely from his pocketbook. Presumably he is cognizant of his own dilatory conduct, which he should know subjects him to liability. He may not guess that the lessor will demand forfeiture. Forfeiture springs

> from a determination to put an end to the relationship between lessor and lessee. The recovery of damages is consistent with its continued existence. Damages may accrue for a long period before the lessor is cognizant of their occurrence. His inability to give notice of what he does not know should not bar him from recovery nor subject him to delay. By forfeiture, on the other hand, he gets his land free from the incumbrance of the lease, frequently with damages as well. Delay in that case is not so harmful to him. The purpose of the notification in forfeiture cases is to enable the lessee to perform his duty and save his interest. In damage cases, no such purpose is served, for the lessee already has laid himself liable to pay for the harm done."

M. Merrill, *Covenants Implied in Oil and Gas Leases at 421*

> "Where the remedy pursued is that of damages, notice, other than filing of suit, is normally not required."

R. Hemmingway, *Oil and Gas* § 8.11 p 450 (2d ed. 1983).

Spaeth v. Union Oil Co., 710 F.2d 1455 (10th Cir. 1983) is not to the contrary. This court did not there have presented the issue of whether demand was a prerequisite to a damage action. *Spaeth* involved both cancellation and damages, and *Spaeth* quoted from *Vincent v. Tideway Oil Programs, Inc.*, 620 P.2d 910, 916 (Okla. App. 1980), a cancellation case. There is nothing in the Spaeth opinion to indicate that it intended to hold that demand was a prerequisite to a pure damage suit.

Plains Petroleum Corp. v. Fine, 174 Okla. 570, 51 P.2d 284 (1935) offers no support to Diamond's position. It involved a lessee who held leases on two adjoining tracts. He drilled a producer on one and surrendered his lease on the other. No drainage occurred before the surrender. The court declined to extend the covenant to protect

against drainage to require the lessee to drill a protective well after his surrender of the lease. In short, the case is totally irrelevant.

Diamond wants a directed verdict based on a proposition of law that no Oklahoma case or statute has adopted, despite being denied that directed verdict by the trial judge sitting in Oklahoma no less than four times, and despite clear lack of reason to believe demand would have served any useful purpose. This court should not grant it.

CONCLUSION

Diamond's claim that the Court's decision is inconsistent with prior decisions is based on a mischaracterization of the Court's opinion. Diamond's demand argument is unsupported by either reason or authority. The other arguments advanced for rehearing are repetitious of arguments that were insubstantial to begin with. The Court has reached a correct and just result, and rehearing ought to be denied.

/s/ Richard C. Ford,

GARY W. DAVIS
RICHARD C. FORD
JAMES U. WHITE, JR.
L. MARK WALKER

-of the Firm-

CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

ATTORNEYS FOR CROSS-APPELLANTS
AND APPELLEES

CERTIFICATE OF CERVICE

This will certify that a true and correct copy of the foregoing Response to Petition for Rehearing was duly mailed postage prepaid thereon, to H. B. Watson, Jr., Richard K. Books, and Sharon L. Taylor of Watson & McKenzie, 1900 Liberty Tower, Oklahoma City, Oklahoma 73102, on this 27th day of June, 1986.

/s/ Richard C. Ford,

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-82-1754-E

DIAMOND SHAMROCK CORPORATION, a Delaware corporation,

Plaintiff,

vs.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual,

Defendants,

and

MORRIS A. RICHARDSON, JOHN HAMILTON, and MARTHA FRANCIS,

Counterclaimants.

CERTIFIED INTERLOCUTORY ORDER
(Filed April 18, 1985)

On this 28th day of March, 1985, Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict came on for hearing before the Court, all parties being represented by their attorneys of record herein, and the parties having presented their authorities and arguments and based upon the record in this case, the Court hereby finds as follows:

1. That Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict should be denied.

2. That on February 11, 1985, the above cause and all counterclaims permitted by the Court to be heard by the jury came on for trial before the Court and jury and that, on February 19, 1985, the jury returned its verdict. By its Journal Entry of Judgment, the Court has rendered judg-

ment in favor of Plaintiff and against Defendants in the amount of $220,830.34 and further against Defendants on their counterclaims of gross negligence, breach of oral contract and kickbacks including punitive damages, and against Counterclaimants on their claim of negligence.

3. The Court's oral instructions to the jury, explaining the verdict forms, may be erroneous and the jury failed to return a verdict either for or against Counterclaimants JOHN HAMILTON and MARTHA FRANCIS on their counterclaims for breaches of the implied covenants to protect against drainage and to market.

4. The Court finds, on its own Motion and pursuant to its letter to counsel for all parties in this case dated February 20, 1985, which is on file in this case, that a new trial should be granted on Counterclaimants JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breach of the implied covenant to market and to protect against drainage.

5. Two jury trials have been held in this case, the Court having previously granted Plaintiff's Motion for New Trial filed after the first jury trial by its Order entered on January 11, 1984.

6. The denial of Plaintiffs' Motion for Judgment in Accordance with Motion for Directed Verdict, the granting of a new trial upon the Court's own Motion and the granting of Plaintiff's Motion for New Trial on January 11, 1984 involve controlling questions of law as to which there are substantial grounds for differences of opinion.

7. An immediate appeal from the rulings specified in Paragraph 6 above may materially advance the ultimate determination of the litigation.

8. An immediate appeal from the rulings herein will prevent protracted and expensive litigation. This matter has been pending for two and one-half years and two lengthy jury trials have been held on these claims, the Court having previously granted a motion for new trial after the first jury trial was held.

9. An immediate appeal will expedite the ultimate termination of this litigation and thereby save unnecessary expense and delay.

10. This Court has directed the entry of final judgment with respect to all other claims in this action, with the exception of JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breach of the implied covenant to market and to protect against drainage. This Court has certified such judgment for immediate appeal pursuant to Rule 54, Fed. R. Civ. P. Thus piecemeal appeals will be avoided by certification of the controlling questions of law involved in these interlocutory orders because all issues can be appealed at the same time.

11. An immediate appeal may avoid a third jury trial on the claims for failure to market and protect against drainage because the incorrect disposition of the controlling questions of law raised by the rulings herein would require reversal of the orders granting a new trial and/or the order denying Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and the reversal of any judgment rendered on a jury verdict after third new trial.

12. An immediate appeal would more efficiently dispose of this litigation under the circumstances of this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff DIAMOND SHAMROCK COR-

PORATION's Motion for Judgment in Accordance with Motion for Directed Verdict is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a new trial is hereby granted on Counterclaimants JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breaches of the implied covenants to market and to protect against drainage.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the new trial hereby granted is stayed until the Court of Appeals disposes of the interlocutory appeal brought from these rulings or until the time for interlocutory appeal has passed without the parties having filed such an appeal.

CERTIFICATION

I hereby certify that the issues disposed of by this Order denying Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and granting a new trial upon the claims of Counterclaimants JOHN HAMILTON and MARTHA FRANCIS for breaches of the implied covenants to protect against drainage and to market, and by the Order entered on January 11, 1984 granting Plaintiff's Motion for New trial, involve controlling questions of law as to which there are substantial grounds for differences of opinion and that an immediate appeal from these Orders may materially advance the ultimate termination of this litigation.

Dated this 18 day of April, 1985.

/s/ Luther B. Eubanks
The Honorable Luther B. Eubanks,
Chief Judge United States District
Court, Western District of Oklahoma

Entered In Judgment Docket 4-18-85

Approved as to form:

/s/ James U. White, Jr.
Gary Davis
CROWE & DUNLEVY, P.C.
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7700

Attorneys for Defendant and
Counterclaimants

/s/ H. B. Watson, Jr.
Richard K. Books
WATSON & McKENZIE
1900 Liberty Tower
Oklahoma City, Oklahoma 73102
Telephone: (405) 232-2501

Attorneys for Plaintiff

ATTEST: A true copy of the original
Francis C. Bonsiero, Clerk

By Nancy Estep
Deputy

Supreme Court, U.S.
FILED
NOV 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIAMOND SHAMROCK CORPORATION,

Petitioner,

v.

JOHN HAMILTON, MARTHA FRANCIS, MORRIS A. RICHARDSON, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, and DAVID B. TRUMBO,

Respondents.

PETITIONER'S REPLY MEMORANDUM

H. B. WATSON, JR.
Counsel of Record
RICHARD K. BOOKS
SHARON TAYLOR THOMAS
WATSON & MCKENZIE
1900 Liberty Tower
Oklahoma City, OK 73102
(405) 232-2501

Attorneys for Diamond Shamrock Corporation

November 21, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-607

DIAMOND SHAMROCK CORPORATION,

Petitioner,

v.

JOHN HAMILTON, MARTHA FRANCIS, MORRIS A. RICHARDSON, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, and DAVID B. TRUMBO,

Respondents.

PETITIONER'S REPLY MEMORANDUM[1]

Respondents, in their Brief in Opposition, assert that the Tenth Circuit properly ruled on the Order granting a new trial after the first trial with respect to all claims, including Diamond Shamrock's claim for well costs, Zinke & Trumbo's counterclaims for gross negligence and Hamilton, Francis, and Richardson's counterclaim for negligence. In short, Respondents have treated the certified interlocutory order in this case interchangeably with the certified final judgment involved only in a separate case. This attempt to treat the two interchangeably is an obvious attempt to hide

---

[1] Diamond Shamrock Corporation's subsidiaries and affiliates are listed on p. ii of Diamond Shamrock's Petition for Writ of Certiorari filed in this case on October 14, 1986.

the fact that the Tenth Circuit decided issues in this appeal that were neither briefed by the parties nor properly before the Court.

Respondents fail to mention that Zinke & Trumbo did not purport to be a party to the appeal below and did not file any pleadings or briefs in the appeal below. Respondents also ignore the effect of the Fed.R.Civ.P. 54(b) certification on the final judgment. App. C to Petition for Certiorari, pp. 43a-44a. Fed.R.Civ.P. 54(b) provides:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon express direction for the entry of judgment. . . ."

Under Rule 54(b) an order cannot be made final and appealable unless it completely disposes of an entire claim.[2] The claims upon which a certified final judgment was entered were Diamond Shamrock's claim, Zinke & Trumbo's counterclaim for gross negligence, and Hamilton, Francis and Richardson's counterclaim for negligence. Those claims were not subject to the certified interlocutory order involved in the appeal below. They were completely disposed of only in the final judgment subject to a separate appeal and should not have been decided by the panel below. This was

---

[2] 6 J. Moore's *Federal Practice*, para. 54.30(1) at pp. 54-162–54-164 (1986).

recognized by the second panel of the Tenth Circuit which decided the appeal from the final judgment as shown by the opinion rendered in that separate appeal, which is attached to Respondents' Brief in Opposition to Diamond Shamrock's Petition for Writ of Certiorari as App. B, pp. 2-7.

The second panel addressed the propriety of denying Diamond Shamrock's Motion for Judgment Notwithstanding the Verdict after the first trial with respect to Zinke & Trumbo's counterclaim for gross negligence and Hamilton, Francis and Richardson's counterclaim for negligence. The propriety of the order granting a new trial after the first trial on those claims was not reviewable in the appeal below.

The fact that the claims completely disposed of by the final judgment involved in the separate appeal were not properly decided in the instant appeal is also shown by a review of the certified interlocutory order and the 54(b) certification on the final judgment (which provides that the judgment on the claims certified as final were "separate, distinct and independent from" Hamilton and Francis' counterclaims for breach of the implied covenants). This is also shown by a review of the issues raised, and the characterization of the certified interlocutory order, by Hamilton and Francis in their Petition for Permission to Appeal and Docketing Statement filed in the appeal below. App. M and N to Petition for Writ of Certiorari filed on October 14, 1986.

Thus, the Tenth Circuit departed from the usual course of judicial review by deciding issues involved in only the separate appeal from the final judgment.

Respectfully submitted,

By: _____

H. B. WATSON, JR.
Counsel of Record
RICHARD K. BOOKS
SHARON TAYLOR THOMAS
WATSON & MCKENZIE
1900 Liberty Tower
Oklahoma City, OK 73102
(405) 232-2501

Attorneys for Diamond
Shamrock Corporation

November 21, 1986